Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

ALAN MIKELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 23, 2010

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QUESTIONS PRESENTED

I. Did the Sixth Circuit Panel Err By Requiring That Both An Actual Conflict of Interest and An Adverse Effect On Defense Counsel's Performance Must Be Proven To Establish A Sixth Amendment Violation Where: (1)Defense Counsel Is Accused During Trial To Be An Unindicted Co-Conspirator, (2) There Is A Contemporaneous Objection and (3) The Trial Court Failed to Make Any Inquiry, Contrary to the Framework Established By This Court To Identify Convictions That Are Not Fundamentally Reliable?

II. Did the Sixth Circuit Panel Err by Holding that it Was Necessary to Establish An Adverse Effect On Counsel's Performance Where There was Objection At Trial, Contrary To This Court's Holding in *Holloway v. Arkansas*, 435 US 475 (1978)?

PARTIES TO THE PROCEEDINGS

Petitioner

Alan Mikell, Petitioner, is an individual and has no corporate affiliations.

Respondent

The United States of America.

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Petitioner Alan Mikell respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered on August 27, 2009.

CITATION OF REPORTS OF OPINIONS AND ORDERS

The Court of Appeals' Opinion appears at 2009 Fed Appx 0613N (6th Cir. 2009) and is attached as Appendix A. The Order of the District Court Denying Petitioner's Motion for Acquittal and New Trial is attached as Appendix C. The Order of the District Court Denying Petitioner's Motion for Reconsideration appears at US Dist LEXIS 29622 (ED MI 2006) and is attached as Appendix D.

JURISDICTION

This Court's jurisdiction is invoked under Title 28, United States Code §1254(1). The Sixth Circuit Court of Appeals had jurisdiction over Petitioner's appeal pursuant to Title 28, United States Code §1291. The instant Petition is timely filed within 90 days from the date of the denial of the lower court's rehearing pursuant to S.C.R. 13.3.

On August 27, 2009, the Sixth Circuit Court of Appeals issued an opinion affirming Petitioner's convictions for money laundering conspiracy and wire fraud in violation of 18 USC §1956(h) and §1343. A copy of the opinion is attached as Appendix A. Petitioner filed a Motion for Rehearing on September 9, 2009. The Court of Appeals denied Petitioner's Motion for Rehearing on November 25, 2009. (Appendix B)

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

U.S. Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Wire Fraud
18 USC §1343

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds, for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Laundering of Monetary Instruments
18 USC §1956(h)

> Any person who conspires to commit any offense defined in this section of section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

STATEMENT OF THE CASE

Petitioner was convicted by a jury on May 25, 1999 following a 49 day trial. His convictions were for money laundering conspiracy (18 USC §1956(h)) and wire fraud (18 USC §1343). His charges arose from the sale of about 700,000 pounds of cheese produced at a Pinconning, Michigan plant operated by Mikell, a Tulsa, Oklahoma petroleum engineer, and co-defendant Christopher Grisel. Petitioner became involved in the operations of the Michigan cheese plant in 1994 after drilling a disposal well there. The plant's cheese inventory was subject to a security interest in favor of the National Farmers Organization (NFO), the plant's milk supplier. Remaining cheese was sold by Mikell and Grisel after the plant closed in January, 1996. The sale price was substantially below the market value and netted less than the debt owed to NFO. It was alleged Grisel and Mikell contrived with a co-conspirator to resell the cheese at close to market price and to deprive NFO of the difference, about $1,000,000.

It was the theory of the indictment that the defendants defrauded NFO by "hindering and delaying" disclosure of information to NFO about the below market sale. It was alleged that the defendants'

efforts to move the sale proceeds through several bank accounts to avoid payments to NFO was a money laundering conspiracy.[1]

One of Mikell's two attorneys at trial was Steven Harris, a civil practitioner from Tulsa, Oklahoma. Harris was intimately familiar with the facts of the criminal case because he acted as a business lawyer for Mikell and Grisel in their operation of the cheese plant and defended their interests in parallel civil litigation brought by NFO in 1996 against the cheese plant, Real Pinconning Cheese (RPC) to enforce its security interest in the cheese inventory and to collect its unpaid milk bill. Harris also represented Mikell and Grisel in pre-indictment contacts with the United States Attorneys Office. He later filed an appearance in the district court as co-counsel for Mikell and actively participated in the trial. (R112, Harris Appearance; R390, Order Denying Defendant's Motion for New Trial, pp. 5-14).

At the start of the trial, the court asked and petitioner agreed to waive Harris's potential successive representation conflict arising from Harris's prior representation of Grisel in the NFO suit against RPC and any advice of counsel defense which might arise from legal advice from Harris in connection with the transactions the Government argued were fraudulent. (R321, TR 2/22/99, pp. 23-31).

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[1] Mikell was also charged and found not guilty of other counts alleging schemes to defraud investors in the cheese plant. (R42, Second Superseding Indictment; R390 Order Denying Defendant's Motion for New Trial, 11/18/04, pp. 1-5).

In addition to cross-examining the government witnesses he had deposed in the related civil litigation, Harris was responsible for a theory of defense at trial based on the Uniform Commercial Code that there was no loss to NFO because its security interest in the cheese was without value. Michigan counsel for Mikell, Harold Gurewitz, gave Mikell's opening statement and cross-examined witnesses not examined by Harris. The prosecutors complained several times during the trial that Harris' had additional potential conflicts of interest because he had represented a number of the Government's witnesses in civil litigation. Mikell, through both counsel, objected on several occasions to testimony from Government witnesses that implicated Harris in the alleged frauds. (R390, *Id*, at pp. 5-14).

On April 9, 1999, the 27th day of trial, the prosecutor accused that Harris was an unindicted co-conspirator. The prosecutor claimed that Harris had given legal advice to Mikell and Grisel in the operation of RPC and manipulated the civil lawsuit with NFO to further the aims of the conspiracy to hinder and delay disclosures to NFO about the status of proceeds from RPC's sale of its last inventory after the RPC plant was closed in January, 1996. The accusation was made out of the jury's presence and in response to the court's request to the prosecutor to justify challenged testimony given by an IRS agent concerning a telephone call by Grisel to Harris during the agent's execution of a search warrant at Grisel's office. (R346, TR 4/12/99, pp. 1-3, JA 2780-2781; R174 Government Memo re: Attorney Harris as Unindicted Co-Conspirator, 4/14/99, JA 489).

On April 14, 1999 Mikell moved for a mistrial through attorney Gurewitz because of the Harris co-conspirator accusation.[2] He argued that the gravity of the accusation against Harris required the court to decide whether Harris suffered as a co-conspirator from a conflict of interest during his role at trial. He asked the court to decide the motion before proceeding on with the trial. He argued that Harris had an irremediable personal interest conflict as a co-conspirator who was accused of participating in the very same criminal conspiracy for which Mikell was on trial. (R348, Colloquy, 4/14/99, pp. 17-18, 23-24).

Harris' own attorney appeared at the April 14, 1999 hearing and asked the court to allow Harris to withdraw as counsel for Mikell because of Harris' conflict of interest as a co-conspirator. She told the court that Harris's conflict could not be waived. (R348, TR 4/14/99, pp. 36-39, 72-73). Mikell, through attorney Gurewitz, told the court that it was "required to make a determination" on the conflict issue and his motion for mistrial. (*Id* at 74-77). The court granted

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[2] "Therefore, I find this accusation troubling, your Honor, but, nevertheless, it is made and I believe that, unfortunately, under the circumstance, even if the court finds there is no basis for it, we're still left with the prosecutor's position that there is a basis for it, and I think we are in the same situation whether the court determines it was founded or unfounded."; "[The prosecutor] then has introduced evidence in this case – and there has not been a stipulation from Mr. Harris – having Mr. Harris testify; but the words of Mr. Harris have come in through Mr. Purtell testifying about what Mr. Opperman told Mr. Purtell, and there has now been a letter which was introduced just yesterday signed by Mr. Harris which Mr. Brunson says is Mr. Harris' words demonstrating illegal conduct." (R348, Colloquy, 4/14/99, pp. 13-16).

Harris' motion to withdraw. (*Id* at 78-88). Mikell again requested the court to decide his motion for mistrial.[3] The court denied the mistrial motion without prejudice and the trial proceeded without Harris and with Mikell represented only by Gurewitz. (*Id*, JA 2849-2938).

The jury returned verdicts of guilty on money laundering conspiracy and wire fraud on May 25, 1996. Mikell filed a motion for new trial renewing his objection to the trial court's failure to examine the effect of Harris's conflict of interest on his representation of Mikell up to the date of his withdrawal. Mikell also filed a motion for acquittal. (R237, Motion for Judgment of Acquittal, 6/29/99).

The district court granted Mikell's motion for acquittal and for arrest of judgment after trial on September 24, 2001, 27 months after the verdict. (R295). It concluded there was no proof of a loss or deprivation of money or property by NFO to satisfy the wire fraud statute. It also held Mikell's Sixth Amendment issues were moot because of the acquittal

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[3] "Your Honor, let me just very quickly make clear that I thought, and I've been under the assumption all morning, for the last five hours, that what we've been discussing today was my motion for mistrial." "I think its' something that needs to be addressed before we proceed with the trial. The issues are no different because of Mr. Harris' withdrawal than they were before." " The issues of prejudice that I've been discussing are still there, and they haven't gone away. I have articulated this morning on several occasions all the reasons in support of the motion. I'll be happy to attempt to prepare something in written format, judge, I did that earlier, a month ago, on other matters. I think this is an issue that needs to be decided." (*Id* at 89-90).

and left the Harris' conflict of interest unexamined. (R295, Order Granting Motion for Acquittal).

The Government appealed the acquittal. The Court of Appeals reversed and remanded on December 5, 2003 for consideration of Mikell's new trial motion that raised all the Harris conflict of interest issues Mikell argued at trial. It held there was sufficient evidence of money or property that was the object of the alleged scheme to satisfy the elements of the offenses. (R375, Order Reversing Order and Remanding, 12/5/03).

On remand, the district court denied Mikell's new trial motion on November 18, 2004. It did so without an evidentiary hearing and without any consideration of its failure to make inquiry about the effect of Harris' conflict of interest on his performance up to the time of his withdrawal when the Harris conflict issues were brought to its attention by Mikell's motion for mistrial on April 14, 1999. (R390, Order Denying Defendants' Motions for New Trial, 11/18/04, pp. 15-27).

In denying Mikell's new trial motion, the court found the record did not support the conclusion that there was an adverse effect on Mikell's Sixth Amendment right to effective assistance from Harris's role in the case. (R390, p. 23). It observed that "Harris' conflict and self-interest to avoid prosecution provided the incentive for him to avoid, at all costs, injecting himself as a party to the conspiracy," R390 at 24, but it failed to take into account any potential effect of Harris's conflict on Mikell's decision at the beginning of the trial to waive an advice of counsel defense that would have required examination of Harris's role in the conspiracy. The court observed that there "is no evidence that his [Harris'] alleged conflict caused him

to ask questions during cross-examination of witnesses that injected his own name as a person with ties to the criminal conduct at issue." (*Id.*), but it also failed to take into consideration the obvious and complete absence in the record of any attempt by Harris to ask any question about his own conduct on cross-examination of the witnesses who gave testimony implicating him in the conspiracy.

After Mikell filed a motion for reconsideration on December 3, 2004, the district court ordered an evidentiary hearing at its own instigation for the first time, over five years after the trial, to "cut against" Mikell's argument or to "avoid any such neglect by this court" that it had failed to make any inquiry at trial in 1999 about the effect of Harris' conflict before the jury reached its verdict.[4]

The district court rejected Mikell's arguments that its failure to inquire at trial on the effect of Harris' conflict was determinative.[5] The trial court held, based on *Mickens v. Taylor*, 535 US 162, 172-173 (2002), that there could not be an automatic reversal even if it failed to make inquiry about Harris' self-

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[4] The Court stated in its Opinion that: "While in fact the court did not pass on the motions for a mistrial based on this alleged conflict in 1999, it granted Defendants' motions for acquittal, thus, in the court's prior view, obviating the need to do so." (R398, Order Setting Hearing, 2/01/05).

[5] "In this case, the court *permitted* the [sic] withdrawal of the attorney allegedly conflicted once this issue was presented to the court and did not force continued representation, making it similar to those cases where courts have neglected a duty to inquiry about a conflict." (R390).

interest conflict of which it knew, or should have known, unless it was one that also affected counsel's performance.

Four witnesses testified at the evidentiary hearing on August 17 and 18, 2005. Harris testified that he had little specific memory of his role 7 years earlier as trial counsel for Mikell. (R429, Order Denying Motion for Reconsideration, pp. 10-17). The court denied the motion for reconsideration on May 16, 2006. (R429, Order, 5/16/05) finding there was no evidence of an adverse effect.

The trial court ultimately imposed a 30-month custodial term and a fine of $20,000 on December 1, 2006. It ordered forfeiture of $639,575.22. (R490, Judgment). The court of appeals granted bond pending appeal on June 19, 2007.

The Court of Appeals affirmed Mikell's conviction on August 27, 2009. The court agreed that Harris had a conflict of interest as an unindicted co-conspirator of which the trial court had knowledge at trial.[6] The Court of Appeals also recognized the trial court's obligation to conduct an inquiry about a conflict of

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[6] The Court of Appeals opinion stated: "By the time the government explicitly described Harris as an unindicted co-conspirator, a conflict of interest was apparent. While Mikell had earlier waived any conflict regarding Harris's dual representation in a parallel civil proceeding, no such waiver occurred as to the government's claim that Harris was himself involved in a scheme to defraud." (Appendix A, Opinion, p. 17).

interest of which it knows or should have known.[7] It held, however, that it was Mikell's burden to establish explicit evidence of an adverse effect on Harris' performance, that is, "a specific instance before or during the trial in which Harris was compromised to Mikell's detriment." (R563, Opinion, p. 19). It held that "Mikell has not established that Harris' conflict of interest affected his performance." *Id.*

The Sixth Circuit denied rehearing and rehearing en banc on November 25, 2009. On December 8, 2009, it granted Mikell's Motion to Stay the Mandate. Subsequently, on January 12, 2010, the district court revoked Mikell's bond, taking the position that Mikell did not have a "substantial issue" to raise on appeal. On January 25, 2010, the Court of Appeals refused to grant bond pending this petition.

REASONS FOR GRANTING THE WRIT

This case involves closely interconnected issues concerning the appropriate Sixth Amendment analysis where defense counsel has a conflict of interest as an unindicted co-conspirator and the court is put on notice of the conflict by the defendant's motion for mistrial but fails to make any inquiry at trial to determine the effect of the conflict on the role of defense counsel. The issues presented in this Petition require the court to examine the strong disagreement

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[7] "The Supreme Court concluded in *Mickens* that the trial court, having knowledge of defense counsel's prior representation of the victim, should have conducted an inquiry, which is required when " the trial court knows or reasonably should know that a particular conflict exists," *Mickens*, 535 US at 184 (citing *Cuyler v. Sullivan*, 446 US 335, 346 (1980))." *Id* at 19.

among the circuits on the defendant's burden to establish a violation pursuant to *Cuyler v. Sullivan*, 446 US 335, 348 (1980) and the "automatic reversal" rule of *Holloway v. Arkansas*, 435 US 475 (1978), in light of *Mickens v. Taylor*, 535 US 162 (2002).

The record and opinions below presenting the case of a trial where defense counsel was accused of participation in the same criminal acts as those for which the defendant was on trial, squarely presents an opportunity for the court to clarify an unsettled area of Sixth Amendment law and to correct a serious Sixth Amendment violation.

I. The Sixth Circuit's Requirement That Both An Actual Conflict of Interest and An Adverse Effect On Defense Counsel's Performance Must Be Proven To Establish A Sixth Amendment Violation When (1)Defense Counsel Is Accused During Trial To Be An Unindicted Co-Conspirator, (2) There Is A Contemporaneous Objection and (3) The Trial Court Failed to Make Any Inquiry, Is Contrary To The Framework Established By This Court To Identify Convictions That Are Not Fundamentally Reliable.

The first issue concerns the Sixth Circuit panel's choice of the burden the defendant must meet in order to obtain relief from his conviction because of his defense attorney's conflict of interest where counsel objected at trial and the court was otherwise on notice of the conflict. The panel misapplied *Mickens v. Taylor*, 535 US 162 (2002) and *Cuyler v. Sullivan*, 446 US 335 (1980) and failed to apply *Holloway v. Arkansas*, 435 US 475 (1978). The Sixth Circuit

obviously read *Mickens* to require the defendant to establish an adverse affect on defense counsel's performance. Relying on *Mickens*, the Sixth Circuit erred by failing to apply the *Holloway* "rule of automatic reversal", which rule requires reversal where the trial court is put on notice of defense counsel's conflict and fails to make any inquiry. 435 US at 488. The Sixth Circuit opinion in *Mikell* requiring the defendant to establish an adverse effect, even when the trial court had actual notice of defense counsel's conflict of interest and the continuing division among the circuits on the scope of *Sullivan* since the *Mickens* decision, demonstrate a compelling need for this Court to re-examine the application *Sullivan* and *Holloway* and this Court's conflict of interest jurisprudence.

The Sixth Amendment right to effective assistance of counsel includes the correlative right to conflict free counsel. *Wood v. Georgia*, 450 US 261, 272 (1981); *Glasser v. United States*, 315 US 60, 77(1942). These rights serve "to ensure a fair trial." *Strickland v. Washington*, 466 US 668, 692 (1984); *United States v. Gonzalez-Lopez*, 548 US 140, 147 (2006)("And even our recognition of the right of effective counsel within the Sixth Amendment was a consequence of our perception that representation by counsel "is critical to the ability of the adversarial system to produce just results." *Strickland, supra*, at 685).

The burden for a defendant to obtain relief based on a claim of ineffective assistance of counsel generally requires the defendant to establish that his attorney's performance was so deficient that there is a reasonable probability that but for counsel's ineffectiveness, the

results of the proceedings would have been different. *Strickland supra*,, at 688; 104 S Ct 2052 (1954).

This court has recognized two exceptions to the *Strickland* rule where the claim of ineffective assistance is based on a conflict of interest. In *Holloway v. Arkansas*, 435 US 475, 488 (1978), the court announced that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic", the so-called "automatic reversal rule." In *Sullivan*, this court established a lower burden than the often difficult requirement of *Strickland*, for conflict of interest claims not preserved by contemporaneous objection, to prove that defense counsel's ineffective performance materially affected the outcome. *Cuyler v. Sullivan*, 446 US 335, 348 (1980). According to *Sullivan*, where there has not been a "timely" objection to counsel's conflict of interest, a defendant may obtain relief if he can "demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 US at 348 (1980).

The circuit courts were divided after *Sullivan* by questions concerning whether its lesser burden for potential conflicts where there had not been a timely objection, applies only to concurrent or multiple representation conflicts, as in *Sullivan* [8]

In the 22 years from *Sullivan* to *Mickens*, the circuits split widely, some narrowly limiting the reduced *Sullivan* burden for potential conflicts where

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[8] "Sixth Amendment - Trial Counsel and Conflict of Interest," 116 Harv. L. Rev. 242 (2002)

no timely objection had been made to multiple representation conflicts,[9] while others applied it liberally to virtually all claims of ineffective assistance arising from conflicts.[10] As a moderating position, a few circuits engrafted elements to the *Sullivan* rule narrowing its scope.[11]

In *Mickens*, this Court addressed the disparity of these views in the context of Mickens claim of ineffective assistance arising from the prior representation by one of his appointed lawyers of the victim in Mickens' capital case. The *Mickens* opinion affirmed the lower court's en banc denial of relief. Relying on *Cuyler v. Sullivan*, 446 US 335, the circuit court held that Mickens failed to demonstrate an adverse effect from defense counsel's potential conflict about which Mickens complained for the first time eight years after his conviction. 535 US at 166.

This Court's opinion in *Mickens* was limited to review of the lower *Sullivan* burden as used when the

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[9] *Perillo v. Johnson*, 205 F3d 775, 797 (5th Cir. 2000)(case law applies *Sullivan* to all types of multiple representation conflicts); *Atley v Ault*, 191 F3d 865, 870, n.4 (8th Cir. 1999); *United States v Mays*, 77 F3d. 906, 909 (6th Cir. 1996); *Beets v Scott*, 65 F3d 1258 (5th Cir. 1995)(en banc)

[10] *Riggs v. United States*, 209 F3d 828, 831, n.1 (6th Cir. 2000)(*Sullivan* applies to all multiple representation conflicts); *Winkler v Keane*, 7 F3d 304, 307-08 (2nd Cir. 1993); *Mannhalt v. Reed*, 847 F2d 576, 679-80 (9th Cir. 1988).

[11] *Veney v. United States*, 738 F2d 1185, 1193 (DC Cir. 1999); *Enoch v. Gramley*, 70 F3d 1490, 1496-97 (7th Cir. 1995); *Mauden v. Bunnell*, 35 F3d 477, 480 (9th Cir. 1994); *Smith v. White*, 815 F2d 1401, 1405-06 (11th Cir. 1987)

defendant fails to object to a potential consecutive representation conflict at trial. ("[T]he only question presented concerned the effect of a trial court's failure to inquire into a potential conflict upon the *Sullivan* rule that a deficient performance of counsel must be shown." *Id. at* 174). The *Mickens'* opinion, however, did not directly resolve the question concerning the scope of *Sullivan*. ("In resolving this case on the grounds on which it was presented to us, we do not rule upon the need for the *Sullivan* prophylaxis in cases of successive representation. Whether *Sullivan* should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question." *Id.* at 176.) While it cautioned in dicta that lower courts had applied the reduced *Sullivan* burden "unblinkingly" to concurrent and to other kinds of conflicts, including successive representation and personal interest conflicts, it did not resolve the wide disparity among the circuits in their applications of *Sullivan*[12]. According to *Mickens,* however, the rationale for the lower *Sullivan* burden, that concurrent representations entails a high probability of prejudice that is often difficult to prove, does not necessarily hold true for other types of potential conflicts. Although not discussed in *Mickens,* five circuits have identified the same probabilities of prejudice inherent in multiple representation conflicts, in the stark division of loyalties that occurs between

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[12] Skinner, Mark W., "Conflicts of Interest Challenges Post *Mickens v. Taylor*: Redefining the Defendant's Burden in Concurrent, Successive, and Personal Interest Conflicts." 60 Wash & Lee L. Rev. 965, 995 (2003)("Thus, despite the Supreme Court's ruling in Mickens, the circuits are still in conflict over the effect of a trial court's failure to conduct a Cuyler inquiry. Therefore, more guidance is needed").

defense counsel's personal interests and his duties owed to his client, as in *Mikell*, where defense counsel has been implicated in the same criminal conduct or conduct very closely related to his client's charged offense.[13] Although this body of case law was presented to the court's below in *Mikell*, the Sixth Circuit did not identify it in its analysis.

Circuit court decisions during the eight years since *Mickens* reflect a continuing and marked disparity and lack of clarity in the application of the lower *Sullivan* burden to conflict of interest claims as exemplified by

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[13] *United States v. Fulton*, 5 F3d 605 (2nd Cir. 1993)("A situation in which the attorney's own interests diverge from those of the client presents the same core problem presented in the multiple representation cases: the attorney's fealty to the client is compromised. Therefore, courts have held that the presumption of prejudice set forth in *Cuyler* applies as well to situations where the personal interests of the attorney and the interest of the client are an actual conflict."); *Virgin Islands v. Zepp*, 748 F2d 125, 135 (3rd Cir. 1994)("We believe that, despite the fact that this case does not present the usual multiple representation situation, "conflicting interests" nonetheless arise out of personal interest of counsel that were "inconsistent, diverse, or otherwise discordant" with those of his client and which affected the exercise of his professional judgment on behalf of his client."); *Rubin v. Gee*, 292 F3d 396, 402 (4th Cir. 2002)("While the Supreme Court has expressed doubt about whether *Sullivan* applies to every potential conflict of interest, *see Mickens* ***, the court has never indicated that *Sullivan* would not apply to a conflict as severe as the one presented here. Therefore, we conclude that the state correctly utilized the *Sullivan* framework when analyzing Rubin's ineffective assistance of counsel claim."); *United States v. Greig*, 967 F2d 1018, 1022 (5th Cir. 1992); *Mannhalt v. Reed*, 847 F2d 576, 580 (9th Cir. 1998)("We find that when an attorney is accused of crimes similar or related to those of his client, an actual conflict exists because the potential for diminished effectiveness in representation is so great.").

the *Mikell* decisions in the courts below.[14] In *Mikell*, the Sixth Circuit applied the "*Sullivan* prophylaxis" to Harris' personal interest conflict, but it ignored *Holloway's* rule of automatic reversal where the trial court refused to examine the affect of Harris' self-interest conflict on his role in the case. The trial judge in Petitioner's case was on notice of multiple conflict claims by the prosecutor.(R390, pp. 5-15). The prosecutor's co-conspirator accusation came on the 27th day of the trial. Nevertheless, in spite of both specific claims that defense counsel Harris' representation was subject to a conflict of interest after the co-conspirator accusation and the prosecutor's numerous remarks to the court from the beginning of the trial that Harris' role as defense counsel for Mikell was subject to conflict, the trial court never made any retrospective inquiry at trial concerning Harris' role up to the time of the accusation.

Since *Mickens*, the Sixth Circuit in a case prior to *Mikell*, and the Eighth Circuit have narrowly interpreted *Mickens* to limit the *Sullivan* burden only to cases of concurrent representation conflicts.[15] In spite of *Mickens* warning in dicta that "unblinking"

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[14] Eldred, Tigran W., "The Psychology of Conflicts of Interest in Criminal Cases," 58 Kan. L. Rev. 43, 59-60, n. 81, 84-85 (2009); Street, Scott W., "*Schwab v. Crosby*: Interpreting the Scope of the Supreme Court's Tests for Ineffective Assistance of Counsel and Conflicts of Interest.", 31 Am. J. Trial Advoc. 651 (2008).

[15] *Smith v. Hofbauer*, 312 F3d 809, 815 - 818 (6th Cir. 2002); *Stewart v. Wolfenbarger*, 468 F3d 338 (6th Cir. 2006); *Lordi v. Ishee*, 384 F3d 189 (6th Cir. 2004)(*Sullivan* presumption does not apply to successive representation); *Koste v. Dormire*, 345 F3d 974,982 (8th Cir. 2003).

application of *Sullivan* was problematic, the Second, Fourth and Seventh circuits have applied *Sullivan* to all conflicts of interest, including personal interest conflicts as in *Mikell.*[16] The Fourth, Seventh and Eleventh circuits have expressed a cautionary view of *Sullivan* in light of *Mickens,* but have continued to find the *Sullivan* standard applicable.[17]

The lack of clear guidance in the application of *Sullivan* to conflicts of interest other than concurrent representation conflicts is exemplified in *Mikell,* where the Sixth Circuit "unblinkingly" applied it to a personal interest conflict and required proof of an adverse effect, contrary to *Holloway,* even though

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[16] *Tueros v. Greiner,* 343 F3d 587, 593-594 (2nd Cir. 2003)("the discussion of the scope of *Sullivan* [in *Mickens*] is dicta"); *United States v. Fuller,* 312 F3d 287, 291 (7th Cir. 2002); *United States v. Burgos-Chapparo,* 309 F3d 50, 52 (1st Cir. 2002)(lesser standard when any conflict of interest is present); *United States v. DeCologero,* 530 F3d 36 (1st Cir. 2008)(applies *Sullivan* to situation where law partner represented a witness); *United States v. Stitt,* 441 F3d 297, 301 (4th Cir. 2006)("we have concluded on multiple occasions that *Sullivan* applies, even when counsel is not representing two or more persons), vacated on other grounds); *Campbell v. Rice,* 302 F3d 892, 896-97 (9th Cir. 2002)(*Sullivan* applies where defendant and counsel were being simultaneously prosecuted by the same office).

[17] *Brownlee v. Haley,* 306 F3d 1043, 1064 n.17 (11th Cir. 2002); *Holleman v. Cotton,* 301 F3d 737, 743 (7th Cir. 2002)(*Mickens* casts doubt on using *Cuyler* in successive representation conflicts); *Rubin v. Gee,* 292 F3d 396, 402 n.2 (4th Cir. 2002)(expressed doubts about applying *Cuyler* outside of multiple representation conflicts but applied it to giving illegal advice to client); *Schwab v. Crosby,* 451 F3d 1308, 1327-28 (11th Cir. 2006)(for purposes of habeas, law is not settled as to whether *Sullivan* applies to conflict based on personal interest).

Mikell objected in a timely manner to the conflict at trial and the trial court failed to make any contemporaneous inquiry about the impact of the Harris personal interest conflict on Harris' representation of Mikell up to the point in the trial when the court granted Harris' motion to withdraw.

II. The Sixth Circuit's Requirement That It Was Necessary to Establish An Adverse Effect On Counsel's Performance Where There was Objection At Trial Is Contrary To This Court's Holding in *Holloway v. Arkansas*, 435 US 475 (1978).

The Sixth Circuit rejected petitioner's claim that the trial court erred by failing to inquire about the Harris conflict of interest at trial and relied on the discussion of the trial court's duty of inquiry in *Mickens*, but not the *Holloway* rule of "automatic reversal." (Appendix A, pp.16-20).

Circuit courts that have addressed this issue since *Mickens*, as discussed below, have adopted widely inconsistent burdens for defendants to meet in order to obtain relief where an objection has been made to defense counsel's conflict of interest and the trial court otherwise has actual knowledge of the conflict. The Sixth Circuit's conclusion in *Mikell* is itself inconsistent with its own prior decision on this issue in *McFarland v. Yukins*, 356 F3d 688, 703-704 (6th Cir. 2004)("The various circuits have somewhat different views concerning the nature and extent of the trial court's duty under *Holloway*"). In *McFarland*, the Sixth Circuit adopted the position of the Tenth Circuit in *Selsor v. Kaiser*, 81 F3d 1492, 1503 (10th Cir. 1996), "that unless the trial court's duty on timely objection

"encompasses a sound resolution of the conflict problem, "the inquiry mandated by *Holloway* would be an empty ritual." 356 F3d at 704. As demonstrated by the record in *Mikell,* after the trial court granted Harris' motion to withdraw, it made no inquiry of Harris' conflict and made no resolution of the effect of the conflict on all of evidence presented during the first 26 days of the trial while Harris was an active participant in the trial. (R390, Id, pp. 5-15).

This court explained in *Mickens* that *Holloway* "creates an automatic reversal rule only where defense counsel is forced to represent co-defendants over his timely objection, unless the trial court has determined that there is no conflict."at 168. It stressed that the rule applies where there was objection, that is, where counsel did "protest his inability simultaneously to represent multiple defendants." *Id.* at 173-174. [18] Circuit courts have read this language in *Mickens* to increase the defendant's burden by engrafting inconsistent limitations on the rule in *Holloway*.[19]

The Second Circuit *in United States v. Blount*, 291 F3d 201, 211-212 (2nd Cir. 2002), added the requirement for proof of an adverse effect. The defendant complained that the court was put on notice at trial that his defense lawyer had a potential conflict

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[18] As discussed at note 13, precisely the same considerations are present in a personal interest conflict where defense counsel has been involved in the same conduct or conduct related to his client's that are present in a multiple representation conflict.

[19] Glassman, Jeffrey Scott, "*Mickens v. Taylor*: The Court's New Don't Ask, Don't Tell Policy For Attorneys Faced With A Conflict of Interest" 18 St. Johns J.L. Comm. 919, 977 (2004).

of interest because his law firm had represented a government witness. The circuit court concluded in light of *Mickens*, varying from its prior practice of vacatur in circumstances where the trial court failed to inquire on notice of a conflict of interest, that it was not enough for the defendant to prevail only to establish that the trial court failed to inquire into a potential conflict of which it knew or should have known. According to *Blount*, *Mickens* requires both an objection by counsel and evidence that the conflict of interest "hampered the representation, not only whether the trial judge should have been more assiduous in taking prophylactic measures." 122 S Ct at 1247 (Kennedy, J., concurring).

Similarly, the Ninth Circuit in *Houston v. Schomig*, 533 F3d 1076 (9th Cir. 2008), where the defendant complained that the office of his public defender had previously represented a star witness in a factually related case, found that the *Holloway* rule provided for the court's duty to investigate, but it remanded for an evidentiary hearing to allow the court to determine if there was an adverse effect. However, the Eighth Circuit in *United States v. Young*, 315 F3d 911, 915 n. 5 (8th Cir. 2002), held that if the defendant did object, then all he need show is an actual conflict and not an adverse effect.

The First Circuit, in *United States v. DeCologero*, 530 F3d 36, 76 (1st Cir. 2008), added a different requirement, that objection to the conflict must come from defense counsel in order for the *Holloway* rule to apply even though the trial court was clearly on notice of the conflict. The defendant complained that his trial attorney had conflicts arising from his law partner's prior representation of potential witnesses and an

associate's prior employment by a firm that represented another party. The defendant filed a pro se motion near the end of trial complaining of his attorney's conflicts of interest. The court held that *Mickens* "cabined very narrowly", 530 F3d at 76, the automatic reversal rule in *Holloway* to apply only where defense counsel himself objects and the trial court requires him to represent co-defendants over his objection.

CONCLUSION

The decision of the Sixth Circuit in this case misapplied important Sixth Amendment rules. As demonstrated by the disparity in positions among the circuit courts on the issues presented by Mikell's case concerning the trial court's duties of inquiry and resolution of defense counsel's conflict of interest after it is put on notice of the conflict, the burden for a defendant to obtain relief from a claim of conflict of interest remains unresolved, eight years after *Mickens*. Mikell's case presents an unusually clear framework on which to resolve these important Sixth Amendment issues that are widely in dispute.

For each of the foregoing reasons, Petitioner requests that a Writ of Certiorari issue to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX A

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 07-1488 and 07-1524

[Filed August 27, 2009]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
ALAN MIKELL and	)
CHRISTOPHER GRISEL,	)
	)
Defendants-Appellants.	)
	)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF MICHIGAN

O P I N I O N

Before: GILMAN and McKEAGUE, Circuit Judges, and SARGUS, District Judge.*

SARGUS, District Judge. The Appellants, Alan Mikell and Christopher Grisel, appeal their convictions on charges of conspiracy to commit money laundering (18 U.S.C. § 1956) and wire fraud (18 U.S.C. § 1343). Following a three month jury trial, the district court granted both defendants' post-conviction motions for acquittal, concluding that the venue was improper as to certain counts not at issue in this appeal and, as to counts at issue here, that the evidence was insufficient to support the convictions.[1] *United States v. Mikell*, 163 F. Supp. 2d 720, 743 (E.D. Mich. 2001).

The government appealed the district court's order granting the defendants' motions to acquit. This Court reversed the judgment of acquittal, finding that a rational jury could have found both defendants guilty of conspiracy to commit money laundering and mail fraud. *United States Mikell,* Nos. 01-2534, 01-2535, 01-2536, and 01-2537, 84 Fed. Appx. 485 (6th Cir. Dec. 1, 2003).

The case was remanded and the district court was directed to rule upon the defendants' motions for a new trial based upon alleged "irregularities in the trial proceeding." *Mikell,* 84 Fed. Appx. at 488–90. On

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* The Honorable Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

[1] The district court held that the government had failed to prove venue as to Counts 15 through 20, 27 and 29. The government did not appeal the district court's dismissal of these counts. Consequently, these counts are not at issue in this appeal.

remand, the district court overruled the defendants' motion for a new trial. This appeal followed. For the reasons that follow, the judgment of the district court is affirmed.

I.

In the first appeal, this Court described the evidence presented to the jury as follows:

> The offending conduct at stake in this appeal concerns Mikell and Grisel's self-dealing (using mail, fax and telephone) that defrauded secured creditor NFO by diverting most of the value of certain inventory from NFO during the closing days of defendants' cheese-manufacturing business. The series of separate corporations controlled by Mikell and Grisel and the debtor-creditor relationships among these entities and their creditors dictates the outcome of this appeal.
>
> Kraft Company owned a cheese-making plant in Pinconning, Michigan. In 1993, a corporation controlled by Arthur Dore, Pinconning Cheese Co., purchased the plant and equipment from Kraft Company and operated it as Dore's Pinconning Cheese, Inc. (DPC). DPC borrowed $1.5 million from another Dore-controlled entity, Dore & Associates. Dore and Associates secured repayment of this debt by taking a security interest in DPC's assets, including its cheese inventory.
>
> Mikell and Grisel's involvement with the cheese plant began in 1994 as creditors. DPC borrowed

$1 million from EarthSafe, a new corporation formed by corporations owned by Mikell and Grisel. EarthSafe too took a security interest in DPC's cheese inventory and other assets to secure its loan. Later that year, EarthSafe purchased DPC from Dore, including the $1.5 million secured debt owed by DPC to Dore and Associates. EarthSafe began operating the cheese plant as Paul's Pinconning Cheese (PPC).

In March, 1995, the Michigan Department of Agriculture suspended PPC's license and shut down the plant because PPC owed its major milk supplier about $1,000,000. That supplier--National Farmer's Organization (NFO)--was a trust that operated on behalf of its collective member-farmers to market their milk and to collect and disburse money owed to them. In order to resume production, EarthSafe itself obtained a license and then reopened the plant under the EarthSafe name, leasing its equipment and facilities from PPC.

A few months later, Mikell and EarthSafe formed Real Pinconning Cheese, L.C. (RPC) as a new limited liability corporation under Michigan law. RPC began operating the plant in June 1995. It leased the facility and equipment from PPC, obtained its own dairy license, purchased milk, and produced and sold cheese.

Following the earlier financial problems that caused the plant shut down, NFO sold to any business operating that plant on a cash basis only. RPC, however, proposed a credit payment

method that induced NFO to extend credit. RPC arranged for Concord Growth Corporation (Concord) to function as a factor, depositing all RPC's accounts receivable in an account controlled exclusively by Concord and inaccessible to RPC. The factoring arrangement allowed Concord to control this account with the understanding that RPC would receive payment only after NFO's invoices were paid. Several agreements implemented this payment arrangement. First, RPC and Concord signed a factoring agreement that secured payment of the factor fees with a security interest in RPC's assets and inventory. Second, RPC and NFO executed a collateral pledge and security agreement by which RPC gave NFO a first lien and security interest in RPC's cheese inventory. Last, Concord agreed with NFO to subordinate a substantial amount of its (Concord's) interest in the cheese inventory to NFO's interest. In October 1995, the parties filed a UCC-1 statement identifying NFO's lien on RPC's cheese inventory.

Despite the factoring of RPC's receivables, by January 1996 RPC owed NFO over $1 million. This debt was not the same debt that PPC owed to NFO. NFO notified RPC that it was holding RPC in default and exercising control over the collateral-approximately 770,000 pounds of cheese. A number of events took place at this time. Unknown to NFO, Mikell and Grisel contracted to sell the cheese inventory to Nor-Tech Dairy Advisors for $0.25 per pound, well below the market price of about $1.40 per pound. This agreement required Nor-Tech to

immediately resell the cheese to InnoQuest, an entity owned by Grisel, for $0.30 per pound, allowing Nor-Tech to make $0.05 per pound on the transaction and allowing Grisel, through InnoQuest, to acquire the cheese inventory at a price well below market value for eventual resale at market prices.

Without knowing about the secret resale scheme being orchestrated by the defendants, NFO obtained a state court order enjoining the removal of the cheese inventory from RPC's plant to enforce its security interest in the inventory. Faced with this barrier to their scheme, Mikell and Grisel represented to NFO that the cheese inventory was to be sold at market price and the sales proceeds would be paid directly to Concord and in turn, to NFO. This persuaded NFO to lift the injunction.

Defendants withheld the details of its below market sales to Nor-Tech and resale to InnoQuest. The proceeds of the eventual resale of the cheese at market prices enabled the defendants to divert over $1.00 per pound, more than $700,000, from NFO. Most of that amount was paid to a special InnoQuest account under Grisel's control and was used to benefit Mikell and Grisel. Despite the agreement that all RPC accounts receivable go to Concord, the only money paid to the Concord account was the proceeds of the initial sale to Nor-Tech for $0.25 per pound; not the $1.36 and $1.40 per pound that InnoQuest received from two ultimate buyers. As part of the plan to cover up these resales, Grisel directed the two buyers to whom

> InnoQuest resold cheese to make the majority of their payments to Nor-Tech. It in turn forwarded the money to InnoQuest. InnoQuest (controlled by Grisel) disbursed the money to, among others, Mikell.

Mikell, 84 Fed. Appx. at 486–88.

After the jury found the defendants guilty on a number of counts, the district court granted the defendants' motions for acquittal under Rule 29, concluding that the government had failed to prove the necessary elements. The government appealed only the counts dismissed for insufficiency of the evidence. Defendants cross-appealed, asserting that the district court erred by failing to rule on their remaining post-trial motions, which the district court had determined to be moot in light of its grant of the motions for acquittal. *Mikell*, 84 Fed. Appx. at 488.

On appeal, this Court concluded that a rational jury could have found that the defendants committed both money laundering and wire fraud. *Mikell*, 84 Fed. Appx. at 488. The Court also found that the evidence supported the government's theory that the defendants had sold a large quantity of cheese, which was subject to the NFO's first position security interest, to a third party at a price far below the market. *Id.*, 84 Fed. Appx. at 488–89. The defendants misrepresented to NFO that the cheese would be sold at the market price. Thereafter, as the government contended, the third party acted in conspiracy with the defendants to resell the same cheese back to business entities controlled by the defendants, who then reaped approximately $700,000 that was due NFO as the secured party. *Id.*, 84 Fed. Appx. at 488–89.

On remand, the district court denied the defendants' motion for a new trial by order issued November 18, 2004. (Order, May 16, 2006/JA 259.) On December 3, 2004, Mikell filed a motion, which Grisel later joined, for reconsideration of the denial. (*Id.*) On February 22, 2005, Grisel filed a motion for a new trial or acquittal based upon newly discovered evidence, requesting an evidentiary hearing. (*Id.*)

On July 12, 2005, the district court issued an order denying Grisel's motion for a new trial based on newly discovered evidence of alleged perjury and granting, in part, Mikell's motion for reconsideration. (Order July12, 2005.) After conducting an evidentiary hearing on August 17 and 18, 2005, the court declined to vacate or modify its November 18, 2004 order denying the defendants a new trial. (Order, May 16, 2006.)

(i) Grisel's Motion.

Grisel's claim of newly discovered evidence involved the trial testimony of attorneys Joseph Purtell and Richard Green, who were alleged to have given perjured testimony at trial. Both attorneys represented NFO in a parallel civil proceeding involving the defendants. Purtell testified that, while attending a deposition in the civil proceeding, Attorney Dennis Opperman, an attorney then representing the defendants, told Purtell that "[attorney] Steve Harris calls all the shots." (JA 2413–14.) The government contended, as described in more detail below, that Harris was essentially an unindicted co-conspirator. On cross-examination during the trial, Purtell denied that he was then representing NFO in its civil litigation against RPC, a statement shown at the August 17 and 18, 2005 hearing to be false.

Grisel also contended that Green committed perjury at the trial by testifying that he advised NFO not to accept the $188,000 offered by RPC after the discounted sale of the cheese to a co-conspirator. Later, in the presentence report, Green is quoted as listing attorneys fees beginning on the same day the $188,000 check was tendered. The defendants claim that any alleged fraud was negated when the check was cashed.

In its order dated July 12, 2005, the district court found that the alleged perjured testimony was not material and did not establish a likelihood that, had truthful testimony been offered, the outcome would have been different. The court did note that Purtell's testimony "strongly suggests perjury." (Supp. JA 3888.) It concluded, however, that the only purpose of the testimony, sought during cross-examination by Grisel's counsel, was to show that NFO was trying to use the criminal proceeding to collect its debt, which the court held to be immaterial.

As to Green's alleged false testimony, the court found that, even if he had been aware of the $188,000 check and advised NFO to cash it, such facts would not have negated evidence establishing the defendants' scheme to defraud. Green's testimony, according to the district court, would merely establish that the defendants were successful in inducing NFO to give up its security interest based upon false pretenses.

ii. Mikell's Motion.

In the same order denying the motion for a new trial based upon newly discovered evidence, the district court ordered an evidentiary hearing on Mikell's motion for reconsideration as to the issue of

an alleged conflict of interest regarding his former counsel, Steven Harris. Mikell contended that, because Harris was identified by the government during trial as an unindicted co-conspirator, an actual conflict of interest between Mikell and his counsel became apparent. Mikell also alleged that the government engaged in misconduct by deliberately painting Harris as a co-conspirator mid-way through the lengthy trial. Mikell alleged that the government's conduct, which resulted in Harris's withdrawal as counsel mid-trial, denied him his right to counsel of his choosing.

Grisel also claimed that, even though he and Mikell had separate counsel, Grisel was also prejudiced by the Harris withdrawal. Harris had represented Mikell and Grisel in prior civil proceedings. According to Grisel, Harris was providing guidance to his counsel regarding the law of secured transactions.

Four witnesses testified at the hearing conducted on August 17 and 18, 2005. The court described the testimony as duplicative of earlier testimony or otherwise of public record in the case. Harris stated that he and Harold Gurewitz represented Mikell. Harris also conceded that Gurewitz was the lead counsel. He further testified that his role in the trial would have benefitted both Grisel and Mikell.

The second witness was Craig Georgeff, an IRS criminal investigative agent. At trial, Georgeff had previously testified that he executed a search warrant at Grisel's home and office. During the execution of the warrant, Georgeff allowed Grisel to make a phone call. According to Georgeff's trial testimony before the jury, Grisel called Attorney Steven Harris. Georgeff also testified at trial that following the phone conversation,

Mikell told him that he would not help in the location of records. During the hearing of August 2005, Georgeff also testified that, thirteen months before the trial, he had given to defendants' counsel a copy of his report, which included a description of the phone call to Harris. (Order May 16, 2006.)

The third witness was Daniel Opperman, the former attorney for Grisel and Mikell in a related civil lawsuit. Opperman testified that Harris was "calling the shots," but explained that he was referring to litigation strategy and not the operation of the business.

The last witness was Grisel, who testified that he had been relying on Harris's advice in the civil proceedings and that his lawyer looked to Harris for assistance as to the law of secured transactions. (Order May 16, 2006.) Mikell and Grisel contended that the government had unfairly introduced evidence suggesting that Harris was a co-conspirator, thereby requiring his disqualification.

Appellants sought to link the testimony given at the August 2005 hearing with other testimony adduced at trial. During the trial, the government also sought to introduce Exhibit 532, which was a letter dated June 4, 1996 from Harris to Mikell and Grisel. According to the government, the letter was evidence that Harris was acting as a co-conspirator with the defendants in order to delay and hinder creditors. (*Id.* at 2824–39.) The government asserted that, because the letter gave advice as to creating documents fraudulently defeating Mikell's personal guarantee of the debt owed to a Walter Hacker, the crime-fraud exception trumped the attorney-client privilege. (*Id.*)

The defendants also had been charged and were on trial for defrauding Hacker; they were acquitted on all counts relating to Hacker. The district court ultimately found that the crime-fraud exception applied, regardless of whether the attorney was personally aware of the fraud. (*Id.* at 2826.)

At the time the letter was offered into evidence, the district court excused the jury and had extensive discussions with counsel. Significantly, the jury was never present when prosecutors described Harris as a co-conspirator. The prosecutor noted that, prior to trial, he had asked the court to disqualify Harris. Harris entered his appearance only one month before trial. Prior to trial, the government advised the court that it intended to use Exhibit 532 and told the court of its concern that Harris could have a conflict. The government contended that it should not be prohibited from introducing relevant evidence solely because Mikell's counsel was involved in a particular matter.

At this point in the trial, before a hearing was held on the issue of conflict of interest, Harris moved to withdraw as Mikell's counsel. Mikell's lead counsel agreed and advised the court that Harris could not continue to represent Harris at trial. After Mikell affirmatively approved, the court permitted Harris to withdraw.

During closing argument to the jury, the government referred to Harris as the defendant's "bulldog," in reference to his conduct in the civil proceedings. (JA 3198–3203.) Reference was made to Opperman's statement that "Harris was calling the shots." (*Id.* at 3184.) The prosecutor also contended

that a counterclaim filed by Harris on behalf of the defendants was "just part of a delaying action." (*Id.*)

Following the August 2005 hearing, the district court concluded in an order dated May 16, 2006 that its earlier decision denying Mikell's motion for a new trial was correct. In the prior decision, the district found that, even if Harris operated under a conflict of interest, he had done so at the insistence of his client. Further, Mikell had shown no prejudice which required a new trial.

This appeal followed.

II.

The decision of the district court regarding claims of prosecutorial misconduct is reviewed *de novo* by this Court. *United States v. Tarwater*, 308 F.3d 494, 510–11 (6th Cir. 2002) (citing *United States v. Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001); *United States v. Clark*, 982 F.2d 965, 968 (6th Cir. 1993)). In *Darden v. Wainwright*, the Supreme Court held that "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a violation of due process.'" 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

Claims of prosecutorial misconduct are reviewed under a two-step process. *United States v. Carroll*, 26 F.3d 1380, 1383–87 (6th Cir. 1994) (citing *United States v. Bess*, 593 F.2d 749, 753–57 (6th Cir. 1979) and *United States v. Leon*, 534 F.2d 667, 678–83 (6th Cir. 1976)). The first issue is whether the remarks or

conduct were improper; the second is whether the remarks or conduct were flagrant. *Id.*, 26 F.3d at 1387. "The remarks or comments of the prosecutor must be placed within the context of the trial to determine whether such comments amounted to prejudicial error." *United States v. Young*, 470 U.S. 1, 11–12 (1985).

Mikell contends that the prosecutor deliberately and improperly presented otherwise inadmissible evidence to force Harris to withdraw as counsel mid-trial. (Mikell Br. 51–52). The district court rejected this contention, first emphasizing that the government's claim that Harris was a co-conspirator was never made in the jury's presence. (JX 3839, Order Nov. 11, 2004.) Mikell points to the following as evidence of prosecutorial misconduct regarding Harris:

(1) Georgeff Testimony. Special Agent Georgeff testified that when Grisel's house was searched, Grisel called Harris and then did not assist Georgeff in finding certain documents. The district court emphasized the fact that the government had produced Georgeff's report to the defendants in discovery, including a description of the phone call between Mikell and Harris. The prosecutor stated that the testimony was offered to show that the IRS had not acted unreasonably in searching Mikel's home and had permitted him to call an attorney. The district court concluded that prior to trial Mikell knew of Harris's involvement and that the government could not have intended to use the letter at trial to disqualify Harris. Moreover, the government did not argue to the

jury that Mikel's conduct, following his conversation with Harris, was evidence of guilt.[2]

(2) Green and Purtell Testimony. Purtell and Green testified that Opperman, a local attorney representing the defendants in a related civil matter, was surprised when he learned that co-conspirator Hines had resold the cheese to Grisel. Purtell further testified that Opperman apologized to Purcell at a deposition in the same case and told him that Harris "called the shots" (JA 2289, 2410–14). This testimony was presented to support the government's claim that the defendants delayed notifying NFO as to the terms of the sale of the cheese in order to complete the fraud. The fact that Harris too was either in the dark or was concealing the details did not serve to render the testimony regarding Opperman's statement inadmissible as to Mikell or Grisel.

(3) Receipt of payment. The government presented testimony that Harris received a payment of $35,000 from the proceeds made from the sale of cheese to Hines. The government used this testimony to establish that all of the proceeds received from the below-market sale of cheese under the NFO lien did not go to NFO as the secured creditor. This testimony was at least relevant, if not necessary, to the government's proof.

(4) Letter concerning Hacker debt. The last item of evidence claimed to demonstrate the prosecutor's motive in disqualifying Harris is a letter

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[2] Section V addresses Grisel's claim that Georgeff's testimony violated his Fifth Amendment rights.

from Harris to the defendants concerning the Hacker debt, in which Harris advised the defendants to "create exhibits to some new transaction that will hopefully make Hacker happy" and to "provide added assurance that Alan's [Mikell] guarantee is dead" (JA 2826–39). Because the jury acquitted the defendants on all charges relating to an alleged fraud upon Hacker, the introduction of this evidence could not have prejudiced the defendants.

The more troublesome matter is that, at the time the document was offered, the prosecutor only then contended that Harris was a co-conspirator. Based upon the government's claim, the district found that the crime-fraud exception to the attorney-client privilege therefore applied. Even though the government's claim that Harris was a co-conspirator was never presented to the jury, the defendants contend that, at this juncture in the trial, the government deliberately set out to disqualify Harris from continued representation of Mikell.

This claim is not supported by the record. As soon as Harris entered his appearance as counsel for Mikell one month before trial, the prosecutor raised concerns that Harris should be disqualified. The government described Harris's representation of both defendants in related civil cases. The prosecutor also described the same letter Harris sent to the defendants regarding the Hacker matter in the pre-trial hearing . Further, prior to the jury's empanelment, both defendants stated in open court that they waived any potential

conflict based upon Harris's prior representation of both of them.[3]

The district court concluded that the government learned the full extent of Harris's potential conflict only as the evidence developed at trial. The court also noted that, while the government had earlier raised questions about Harris's representation, it had not alleged that he had an actual conflict of interest. Nonetheless, the court concluded that Mikell and Grisel had full knowledge of Harris's prior involvement and, like Harris, did not disclose such information or lodge any objection.[4]

The record does not disclose prosecutorial misconduct. From the outset, the government opposed Harris's representation of Mikell and voiced concerns about conflicts of interest. The full scope of the conflict developed only during the course of the trial. Further, all of the accusations made by the government as to Harris's role as a co-conspirator were made outside the presence of the jury.

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[3] Later, during trial, Harris disclosed that he had also represented three of the government's witnesses, all of whom had been disclosed before the pre-trial conference. The district court admonished Harris, but did not grant the government's request that he be disqualified.

[4] The government notes that Harris himself asked the court for permission to withdraw, which was granted. As discussed below, the trial court correctly noted that Harris's withdrawal did not, by itself, speak to whether the earlier representation was conducted while Harris was conflicted.

As we have held, "[i]n examining prosecutorial misconduct, it is necessary to view the conduct at issue within the context of the trial as a whole." *United States v. Beverly*, 369 F.3d 516, 543 (6th Cir. 2004) (citing *Young*, 470 U.S. at 12; *United States v. Francis*, 170 F.3d 546, 552 (6th Cir. 1999)). Moreover, evidence admissible for one purpose may become a basis for prosecutorial misconduct, if improperly used in argument. In *United States v. Carson*, the prosecutor referred in closing argument to the fact that a co-conspirator had pleaded guilty to the same felonies for which the defendant was on trial. 560 F.3d 566, 573–74 (6th Cir. 2009). The prosecutor argued, "If [the felonies] didn't happen, what kind of deal is that? . . . If the felonies didn't happen, why would he take that medicine?" *Id.*, 560 F.3d at 574.

This Court observed that a "guilty plea of a co-defendant or co-conspirator is never admissible as substantive evidence of a defendant's guilt." *Carson*, 560 F.3d at 574. Evidence of a guilty plea may be used in evaluating the credibility of the co-defendant or co-conspirator. *Id.*, 560 F.3d at 575. In *Carson*, this Court noted that the defense repeatedly emphasized the fact that the co-conspirator had pleaded guilty in exchange for a reduced sentence. The defense contended that such testimony could not be believed. The prosecutor's comments were made to bolster the co-conspirator's credibility.

In *Carson*, this Court concluded that the prosecutor's remarks were improper but did not mislead the jury. *Carson*, 560 F.3d at 576. The co-defendant's guilty plea was mentioned throughout the trial by both the defense and prosecution. *Id.*, 560 F.3d at 477. Moreover, the trial court instructed the jury

that the co-conspirator's guilty plea could not be considered against the defendants. *Id.*, 560 F.3d at 576.

In the case at bar, the evidence offered by the government which tended to implicate Harris as a co-conspirator had a probative value and legitimate basis, wholly independent of Harris's role as trial counsel. As noted in *Carson*, both the context and the purpose of the tendered evidence are critical factors. The government was not limited in presenting its case simply because Harris was potentially implicated in some of the conduct. There is no showing that such evidence was offered as a ploy to disqualify Harris. Consequently, there has been no showing that the government engaged in prosecutorial misconduct.

Even if this Court were to conclude that prosecutorial misconduct occurred, the conduct was not flagrant and did not "make the resulting conviction a violation of due process." *Darden*, 477 U.S. at 181. Assuming that prosecutorial misconduct has been established, only flagrant conduct warrants a mistrial. As explained in *United States v. Galloway*, four factors determine whether the conduct was flagrant: "(1) whether the statements tended to mislead the jury and prejudice the defendant; (2) whether the statements were isolated or pervasive; (3) whether the statements were deliberately placed before the jury; and (4) whether the evidence against the accused is otherwise strong." 316 F.3d 624, 633 (6th Cir. 2003) (citing *Francis*, 170 F.3d at 549–50; *Carroll*, 26 F.3d at 1385).

Mikell contends that the prosecutor's conduct in this case was more egregious than that described in

United States v. Carter, 236 F.3d 777, 782 (6th Cir. 2001). In that case, the prosecutor told the jury in the rebuttal portion of the closing argument that what the defense attorney had said was "one tremendous colossal lie," "a lie, a bold fabrication." *Id.*, 236 F.3d at 785. The statement referred to defense counsel's contention that a bank teller had initially identified another person as the bank robber. Carter's counsel had correctly represented that she had changed her identification. Thus, the prosecutor's statement that the defense counsel's statement was a lie was incorrect. *Id.*, 236 F.3d at 784.

In *Carter*, we held that "this Court, along with the Supreme Court, has repeatedly noted that it is improper for counsel to make personal attacks on an opposing advocate." *Carter*, 236 F.3d at 785 (citing *Young*, 470 U.S. at 9 and *United States v. Collins*, 78 F.3d 1021, 1040 (6th Cir. 1996)). In *Carter*, the prosecutor called the defense counsel a liar four times in closing argument. The claims were a personal attack on Carter's attorney and were inaccurate and misleading to the jury. *Id.*, 236 F.3d at 785–86.

Carter is inapposite to this case. The jury heard testimony as to Harris's actual involvement in the underlying facts of this case. Before the jury, the prosecutor did not impugn Harris's integrity or offer argument that was untrue or misleading.

In the course of the three-month trial, the government made several references to its claim that Harris was a co-conspirator. Significantly, no such claim was ever made in the presence of the jury. The references could not have misled the jury or prejudiced the defendants. The other evidence presented by the

government was strong. All of these considerations weigh in favor of the conclusion that any prosecutorial misconduct was not flagrant.

III.

The decision of the district court in determining whether defense counsel operated under a conflict of interest, thereby violating the defendant's Sixth Amendment right to counsel, is reviewed de novo as a mixed question of law and fact. *United States v. Walker*, 160 F.3d 1078 (citing *United States v. Hopkins*, 43 F.3d 1116, 1119 (6th Cir. 1995)).

As the district court noted, Mikell presented two apparently conflicting positions regarding Harris. (Order May 16, 2006.) First, he contended that the government improperly introduced evidence tending to establish Harris as a co-conspirator. Second, Mikell asserted that Harris operated under a conflict of interest and his interests must have diverged from those of Mikell. (*Id.*) The same contradiction has been raised in this assignment of error.

The prosecutor anticipated the evidence discussed above regarding Harris's role at the time Harris entered his appearance. The government raised the issue of his conflict of interest at the pretrial conference. While the extent of Harris's role became more obvious during trial, before trial, the prosecutor described Harris's role in pending civil litigation, in joint representation of Mikell and Grisel, and his letter regarding Hacker.

Mikell acknowledged and waived any conflict of interest regarding Harris. Simply because Harris

represented Mikell did not prevent the government from offering otherwise admissible evidence of an unlawful conspiracy, even if such evidence implicated or involved Harris. The question is whether such evidence created a conflict of interest that prejudiced Mikell.

By the time the government explicitly described Harris as an unindicted co-conspirator, a conflict of interest was apparent. While Mikell had earlier waived any conflict regarding Harris's dual representation in a parallel civil proceeding, no such waiver occurred as to the government's claim that Harris was himself involved in a scheme to defraud.

The district court addressed the conflict issue on April 14, 1999, in a trial which began on February 22, 1999. At that point in the trial, the prosecutor had sought a ruling on the admissibility of the letter from Harris to the defendants regarding the Hacker debt. The prosecutor claimed that because Harris was a co-conspirator, the crime fraud exception applied to the attorney-client privilege.

The court excused the jury for the day and told counsel that a hearing could be needed to resolve any question of conflict. The court recognized that the potential conflict was separate and apart from the issues raised before trial.

At this juncture, Harris made a motion to withdraw as counsel for Mikell. The court asked Mikell if he objected, which he did not. Consequently, no hearing was held regarding a conflict of interest, and Harris was permitted to withdraw.

The question of whether the trial court erred in failing to inquire as to a conflict is made more difficult by the fact that some of the evidence described above had been adduced by the prosecutor prior to April 14, 1999, which arguably implicated Harris as a co-conspirator and which could have triggered the need for a hearing. As the district court itself observed, the conflict was "not avoided simply because it was revealed and the attorney withdrew."

The district court instead determined that Mikell had failed to establish any prejudice resulting from Harris's conflict of interest. According to the district court, Mikell offered no evidence of specific instances indicating that Harris made decisions or omissions based upon his competing interests with his client. For the reasons that follow, the district court was correct in finding no prejudice to Mikell.

Under the Sixth Amendment, a defendant is entitled to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). When an attorney is actively representing conflicting interests, a defendant is deprived of effective assistance of counsel. In *Holloway v. Arkansas*, the Supreme Court held that there is inherent prejudice when one attorney is compelled to represent three co-defendants. 435 U.S. 475, 488–89 (1978). A defendant has the constitutional right to "an attorney devoted solely to his interests." *Mickens v. Taylor*, 535 U.S. 162, 185 (2002).

Under the traditional *Strickland* analysis, a criminal defendant typically must show (1) his attorney's performance was so deficient that counsel was not functioning as counsel guaranteed by the

Sixth Amendment, and (2) counsel's performance prejudiced the defendant, requiring a showing that the attorney's errors were so serious as to prevent a fair trial. *Strickland,* 466 U.S. at 687.

In *Mickens*, the defendant's attorney had represented the murder victim, a juvenile, in an unrelated criminal case. At the time of the murder, the charges pending against the victim and his representation by Mickens' attorney were under seal. The same judge who appointed the attorney to represent Mickens had also appointed him earlier to represent the victim. *Mickens*, 535 U.S. at 164–65.

Mickens' counsel later testified regarding his belief that he no longer had any obligation to his deceased client. *Mickens*, 535 U.S. at 177. While such belief may have been mistaken, the district court found that the attorney's representation of Mickens was not influenced by his prior representation of the victim. The victim was stabbed and beaten before he was sexually assaulted and murdered. A competent defense attorney would have avoided attacking the character of a 17-year-old victim who was raped and brutally murdered. As noted by Justice Kennedy in his concurring opinion, "Saunders' failure to attack the character of the 17-year-old victim and his mother had nothing to do with the putative conflict of interest." *Id.*, 535 U.S. at 178. Justice Kennedy observed that "a theoretical conflict does not establish a constitutional violation, even when . . . the trial judge should have known." *Id.*, 535 U.S. at 178–79.

The Supreme Court concluded in *Mickens* that the trial court, having knowledge of defense counsel's prior representation of the victim, should have conducted an

inquiry, which is required when "the trial court knows or reasonably should know that a particular conflict exists." *Mickens*, 535 U.S. at 184 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980)). In *Mickens*, however, the Supreme Court rejected a "rule of automatic reversal when there existed a conflict that did not affect counsel's performance, but the trial judge failed to make the *Sullivan*-mandated inquiry." *Id.*, 535 U.S. at 172. Instead, to warrant a reversal, a defendant must establish that "the conflict of interest adversely affected his counsel's performance." *Id.*, 535 U.S. at 174.

Applying *Cuyler* and *Mickens*, it is clear that Mikell has not established that Harris's conflict of interest affected his performance. Mikell has not identified any specific instance before or during the trial in which Harris was compromised to Mikell's detriment. Additionally, the following circumstances further establish that Mikell was not adversely affected by the conflict of interest:

(1) It is undisputed that Mikell's lead counsel throughout the trial was Harold Gurewitz, not Harris, and Gurewitz continued to represent Mikell after Harris withdrew;

(2) Although not dispositive, Harris withdrew and Mikell consented to his withdrawal; and

(3) The government sought to disqualify Harris before the trial began.

IV.

In addition, Mikell contends that the government deprived him of his right to counsel of his own selection. There is no question that under the Sixth Amendment a defendant has the right to counsel of his or her selection. *Wheat v. United States*, 486 U.S. 153, 159 (1988). Moreover, if a defendant is deprived of such right, "it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147–48 (2006). The right to counsel "is circumscribed in several important respects," however, and does not extend to an attorney laboring under an actual conflict of interest. *Wheat*, 486 U.S. at 159, 162. The district court "must recognize a presumption in favor of petitioner's counsel of choice"; however, "that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court." *Id.*, 486 U.S. at 164.

Immediately following Harris's withdrawal, the district court noted that it would have found a conflict of interest. The record discloses that Harris (1) had previously represented both defendants in a parallel civil proceeding; (2) had previously represented a number of witnesses who testified at trial and did not inform the court before trial; (3) wrote a letter to both defendants that was found by the district court not to be privileged, given the crime-fraud exception; and (4) was identified by the government as an unindicted co-conspirator.

From this, it is apparent that Harris's conduct prevented him from proceeding as Mikell's counsel. Even if this Court were to look past Harris's withdrawal as counsel and Mikell's consent, the record amply demonstrates that Harris was operating under an actual conflict of interest. Under such circumstances, Mikell was not deprived of his right to counsel of his selection.[5]

Finally, Grisel contends that he too was denied a fair trial by the prosecutor's deliberate attack on Harris, causing him to withdraw. Grisel claims that his lawyer was relying upon Harris, who was "the driving force of the defense team." (Grisel's Br. 47.)

Harris's own testimony on the record makes it clear, however, that (a) Harris never represented Grisel in this criminal case, and (b) Harris was not even the lead counsel for Mikell. Because of these circumstances, Grisel has no standing to contest Harris's conflict of interest. *United States v. Sims*, 845 F.2d 1564, 1568 (11th Cir. 1988). Even if Grisel had standing, his claims would fail for the same reasons as Mikell's.

V.

In connection with his claim that Harris was improperly disqualified, Grisel also contends that Special Agent Georgeff improperly testified that he let

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[5] As discussed above, the Court has concluded that the prosecution did not improperly target Harris to force his withdrawal. This conclusion forecloses Mikell's claim that the prosecutor acted to deny him of his right to counsel of his choosing.

Grisel call Harris before the IRS searched his house. Georgeff testified that, after Grisel spoke to Harris, Grisel "said he was not going to cooperate." (JA 2743–45.) Grisel contends that this testimony was tantamount to a violation of his Fifth Amendment privilege against self-incrimination. This issue was never directly presented to the district court. Rather, Grisel presented Georgeff's testimony during the August 2005 hearing to support Grisel's claim that the prosecutor acted improperly in seeking to disqualify Harris. Because the Fifth Amendment violation was not asserted below, the claim of error is reviewable now only for plain error. *United States v. Castano*, 543 F.3d 826, 833 (6th Cir. 2008).

A jury may not consider a defendant's pre-arrest silence as substantive evidence of guilt. *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000). In *Combs*, this Court noted that, "[i]n a prearrest setting as well as in a post-arrest setting, it is clear that a potential defendant's comments could provide damaging evidence that might be used in a criminal prosecution; the privilege should thus apply." *Id.*, 205 F.3d at 283. The Fifth Amendment was violated to the extent Georgeff's testimony implied that Grisel's silence, as advised by Harris, was evidence of guilt.

The prosecution contended that the testimony was offered to demonstrate that the IRS did not prevent Grisel from calling an attorney. Importantly, after Georgeff's single reference to Grisel refusing to cooperate in the search, no further mention was made to the testimony. The single reference to Grisel calling Harris, and then subsequently refusing to cooperate, does not constitute an improper method of commenting on Grisel's silence. Even assuming that it did, the

defendant must also establish under *Galloway*, 316 F.3d at 633, that the use of the statement was both flagrant and prejudicial. Applying *Carroll*'s four-part analysis, it is clear that the brief testimony did not tend to mislead the jury. Further, the testimony was isolated. The statement was not a deliberate attempt to comment on Grisel's silence. Finally, the other testimony presented in the three-month trial was strong. Admission of Georgeff's testimony was not therefore plain error. Grisel has not established that he was deprived of a fair trial based upon the withdrawal of Harris or the testimony of Georgeff.

VI.

Grisel asserts that the district court erred in denying his motion for a new trial based upon the failure of proof and perjured testimony. The decision of the district court denying Grisel's motion for a new trial based upon due process claims of perjured testimony, constructive amendment of the indictment and failure of proof is reviewed de novo. *See United States v. Allen*, 954 F.2d 1160, 1165 (6th Cir. 1992); *see also United States v. Wiegand*, No. 93-1735, 1994 U.S. App. Lexis 37209, *5 (6th Cir. Dec. 22, 1994) (citing *Allen*, 954 F.2d at 1165).

Grisel contends at great length that the government never established that RPC was in default, such as was required for NFO, as a secured creditor, to exercise its right to the cheese at the plant. (Grisel Br.17–35). Additionally, Grisel asserts that the government did not establish the market price of the cheese sold by RPC as a key part of the scheme to defraud. Consequently, Grisel argues no crime was committed. These arguments are without merit.

Being generous, these claims are based upon a misapprehension of the facts presented at trial. The government contended, and the jury found, that NFO was defrauded of the value of its security interest. According to the government's case, NFO had a first, secured position on cheese worth approximately $1 million. NFO obtained a restraining order, preventing RPC from moving the cheese from the plant. The defendants fraudulently induced NFO to agree that the cheese could be moved based upon the defendants' representation that it would be sold at the market price.

The government contended that Grisel and Mikell made a sham sale of the cheese to a co-conspirator at a price of less than 20% of its value. The government also offered proof that the co-conspirator then resold the same cheese to entities controlled by the defendants, which in turn sold the cheese for over $1 million. As a result, NFO received only $188,000 on collateral worth $1 million; entities controlled by Grisel and Mikell netted $700,000 on the same collateral, based upon what the government claimed was a scheme to defraud. RPC paid NFO the $0.25 per pound it claimed was the "market price" for 770,000 pounds of cheese. Entities controlled by Grisel and Mikell bought the cheese for $0.30 per pound, giving a $0.05 skim to the co-conspirator. These same entities then sold the same cheese for an arms-length price of between $1.36 and $1.40 per pound.

Grisel claims that:

1. RPC was never in default;

2. The security interest of NFO was never extinguished;

3. The cheese was always subject to NFO's security interest; and

4. The market value of the cheese was never established.

The truth or falsity of the first three claims is irrelevant. The value of NFO's collateral was reduced by $700,000 as a result of the scheme to defraud. Grisel confuses the government's case with that of a private, secured creditor.

As to the fourth claim, it is significant that the actions of the defendants and the co-conspirator alone provide abundant evidence that the value of the cheese was between $1.36 and $1.40 per pound, since arms-length sales were made at these prices shortly after the sham sale for a price of $0.25 per pound. Moreover, the government presented other testimony regarding prices recorded by the Green Bay Exchange, a market-place for cheese, together with that of others in the market, all establishing that $0.25 per pound was a "joke."

Grisel also contends that a new trial is warranted, given the allegedly perjured testimony of Green and Purtell, both attorneys at one time for NFO who both testified at trial. The trial court found that both Green and Purtell gave testimony later found to be false.

During the trial, Green testified that he never recommended that NFO accept $188,000, representing $0.25 per pound of cheese. After trial, Green gave a

statement on behalf of NFO that was incorporated into the presentence report. In the post-trial statement, Green said that NFO was actually paid the amount of $188,000. Grisel contends that the jury should have heard testimony that the check was cashed, as evidence that acceptance of the monies represented settlement and extinguished NFO's security interest.

The district court correctly held that such evidence was immaterial to the case. Even if NFO lost its security interest by negotiating the check, it does not follow that there was no scheme to defraud. The sham sale and deliberate concealment are the basis of the government's case, not the purported extinguishment of the security interest.

Purtell testified at trial that he was at one time involved in the civil litigation brought against RPC. He also testified on March 8, 1999 that, "I'm not involved in that case anymore." (JA 3877.) On remand, the Defendants demonstrated that on January 13, 1999, Purtell had actually filed a lawsuit against RPC on behalf of NFO. The district court described the trial testimony as "more strongly suggest[ing] perjury (or incorrect testimony at a minimum)." (JA 3888.)

Nonetheless, the district court correctly noted that the false testimony was not material to any triable issue. Had the jury known of the correct information regarding Purtell's representation, at best, it would have had additional information that NFO was pursuing its economic interests and sought assistance from the government in pursuing criminal charges. As the district court correctly held, whether NFO or its counsel had such motivation was not probative

evidence of whether a criminal fraud had been committed.

The district court correctly concluded that the claimed newly discovered evidence regarding the trial testimony of Green and Purtell would not have likely resulted in an acquittal.

Grisel contends that because "the proceeds of the liquidation sale were paid to RPC's creditors . . . there has been a constructive amendment to the nature of the charges in this case. As applied here, there can have been no crime." (Grisel Br. 34.) The issue was not presented to the district court and is not properly before this Court.

Moreover, the contention is without merit. Grisel contends that the proceeds received from the market-based price of $1.36 to $1.40 per pound of cheese, totaling over $1 million, were thereafter paid only to creditors of RPC. This argument overlooks the fact that NFO, which received only $188,000, had a first-position security interest in all the cheese. The other creditors paid from the proceeds included InnoQuest, an entity owned by Grisel. InnoQuest also distributed funds to Mikell and paid Harris $35,000 in attorneys fees. All of these facts are consistent with the indictment and the government's theory that Grisel and Mikell engaged in a scheme to defraud NFO of the value of its security interest.

Grisel's contentions do not establish that a constructive amendment to the indictment occurred. Instead, he essentially argues that, because the proceeds of the sale of the cheese went to creditors of

RPC, no crime was committed, a contention which is false.

A constructive amendment occurs "when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged in the indictment." *United States v. Smith*, 320 F.3d 647, 656 (6th Cir. 2003) (citing *Stirone v. United States*, 361 U.S. 212 (1960)).

The indictment clearly alleges the same scheme to defraud that the government pursued at trial. Grisel's only claim of variance concerns his incorrect contention that no crime was established. No constructive amendment occurred.

VII.

Grisel and Mikell contend that the district court erred in reinstating Count 52, which was a forfeiture count. Count 52 of the indictment sought forfeiture of specific assets owned by Grisel or Mikell, particularly their ownership interests in InnoQuest and other corporations that the government contended were used in the commission of money laundering and wire fraud.

The district court held that, because Count 1 alleged a conspiracy to defraud NFO and was reinstated on remand, the conviction on Count 52 must also be reinstated. Grisel contends that the government did not appeal Count 52 and that, as a

result, the district court erred by reinstating it on remand. This assignment of error is without merit.

In the first appeal, the government filed a general notice of appeal as to each defendant, appealing generally "from the Judgment of Acquittal." (Notices of Appeal; JA 754, 755.) The government's original appellate brief noted that the scope of the government's appeal was limited to Counts 1–7, on which the defendants were acquitted based on insufficient evidence. (U.S. Br. 3, 28; JA 1518, 1543.) However, the government also noted in its brief that "[r]einstating count one will also entitle the government to pursue the forfeiture authorized by the jury's verdict on count 52." (U.S. Br. 45 n.20; JA 1560.) In its original opinion, this Court did not refer specifically to Count 52, but simply "reverse[d] the district court's judgment of acquittal on those counts appealed." *Mikell*, 84 Fed. Appx. at 486. Considering the general nature of the government's notice of appeal, and considering that the government did not abandon Count 52 in its brief, we find that Count 52 was appealed, and the district court did not err by reinstating it.

VIII.

For the reasons discussed above, the decisions of the district court are hereby affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 97-CR-81493-BC

[May 16, 2006]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
ALAN MIKELL and CHRISTOPHER GRISEL,	)
	)
Defendants.	)
	)

ORDER DENYING DEFENDANT CHRISTOPHER GRISEL'S AUGUST 2, 2005 AND SEPTEMBER 12, 2005 MOTIONS AND DENYING DEFENDANT'S DECEMBER 3, 2004 MOTION FOR RECONSIDERATION

This matter is before the court following an evidentiary hearing conducted on August 17 and 18, 2005, to determine whether the court's November 18, 2004 order should be vacated. Also pending before the court are motions and briefs related to the court's July 12, 2005 order, which denied Defendant Grisel's

motion for a new trial based on newly discovered evidence of alleged perjury and granted, in part, Defendant Mikell's December 3, 2004 "Motion for Reconsideration." For the reasons stated below, the court will deny Defendant Grisel's "Motion for Leave of the Court to File Response to Government's Post-Hearing Brief and for Hearing" and deny his "Motion for Hearing on Defendant Grisel's Request for Leave to File Response to Government's Post-Hearing Brief . . ." The court will also decline to vacate or otherwise modify its November 18, 2004 order, as first requested in Defendant Mikell's December 3, 2004 "Motion for Reconsideration."[1]

I. BACKGROUND

This case comes with fairly complicated factual and procedural backgrounds, which have been set forth adequately in previous orders of the court. (*See* 11/18/04 Order; 7/12/05 Order.) The court will briefly outline here only the portion of the procedural history which is relevant to the issues currently before the court.

Following the Sixth Circuit's remand of this criminal case, *United States v. Mikell*, 84 Fed. Appx. 485 (6th Cir. 2003), the court considered and denied Defendants' two motions for a new trial. (11/18/04 Order.) During the hearing conducted on the motions, the court inquired as to whether the parties desired an evidentiary hearing and both sides indicated that they did not. (*Id.* at 4-5.) After the court issued its

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[1] Defendant Grisel filed a "Notice of Joinder" to this motion on December 9, 2003. (Dkt. # 393.)

November 18, 2004 order, however, Defendant Grisel and the Government reversed their positions and argued that an evidentiary hearing was required. (7/12/05 Order at 21.) Moreover, Defendant Mikell filed a motion for reconsideration of the November 18, 2004 order. In his motion, Defendant Mikell argued that a hearing was not necessary, principally because he claimed a new trial was mandated as a matter of law. (7/12/05 Order at 21-22.)

On July 12, 2005, the court issued an order denying Defendant Grisel's motion for a new trial and granting in part Defendant Mikell's motion for reconsideration of the November 18, 2004 order. Specifically, with respect to Defendant Grisel's motion, the court found that while Grisel had met the first two of the prongs of the standard for the granting of a new trial based on newly discovered evidence of perjury, he had not met the remaining two prongs.[2] (*Id.* at 14-15.) Thus, despite the fact that the court expressed concern regarding the trial testimony of Joseph Purtell and Richard Green, the motion for a new trial based on newly discovered evidence of perjury was denied. (*Id.* at 24.) The court also granted Defendant Mikell's motion for reconsideration in part. (*Id.*) Specifically, the court rejected Mikell's argument that a reversal of Defendants' convictions was mandated as a matter of

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[2] A motion for a new trial based on newly discovered evidence should be granted only where: (1) the new evidence was discovered after trial; (2) the evidence could not have been discovered earlier with due diligence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence would likely produce an acquittal. *United States v. Braggs*, 23 F.3d 1047, 1050 (6th Cir. 1994); *United States v. O'Dell*, 805 F.2d 637, 640 (6th Cir. 1986).

law under *Holloway v. Arkansas*, 435 U.S. 475 (1978), but ordered that an evidentiary hearing should be conducted in order to determine whether the court's November 18, 2004 order should be vacated. (*Id.*)

An evidentiary hearing was conducted on August 17 and 18, 2005, and the matter is before the court to consider whether any of the evidence presented requires the court to vacate or otherwise modify its November 18, 2004 order.[3]

II. STANDARD

A. Motions for New Trial

Federal Rule of Criminal Procedure 33 governs motions for a new trial. It provides, in relevant part, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interests of justice so requires." Fed. R. Crim. P. 33(a). A decision to grant or deny a motion for a new trial under Rule 33 lies within the discretion of the district court. *See United States v. Lattner*, 385 F.3d 947, 958 (6th Cir. 2004) ("The district court's denial of a motion for new trial is reviewed under an abuse of discretion standard.") (citing *United States v. Gaitan-Acevedo*, 148 F.3d 577, 589 (6th Cir. 1998)).

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[3] The court regrets the delay in adjudicating this motion, a portion of which is due to the hearing having coincided with law clerk transition.

B. Motions for Reconsideration

Rule 7.1(g) of the Local Rules for the Eastern District of Michigan provides that a motion for reconsideration shall be granted only if the movant can (1) "demonstrate a palpable defect by which the court and the parties have been misled," and (2) show that "correcting the defect will result in a different disposition of the case." E.D. Mich. LR 7.1(g)(3). "A 'palpable defect' is 'a defect that is obvious, clear, unmistakable, manifest, or plain.'" *United States v. Lockett*, 328 F. Supp. 2d 682, 684 (E.D. Mich. 2004) (citing *United States v. Cican*, 156 F. Supp. 2d 661, 668 (E.D. Mich. 2001)). A motion for reconsideration which presents the same issues already ruled upon by the court, either expressly or by reasonable implication, will not be granted. E.D. Mich. LR 7.1(g)(3); *Czajkowski v. Tindall & Assocs., P.C.*, 967 F.Supp. 951, 952 (E.D. Mich. 1997).

III. DISCUSSION

A. The Government's "Motion for Leave of Court to File Post-Hearing Brief"

On July 12, 2005, the Government filed a "Motion for Leave of Court to File Post-Hearing Brief." (Dkt. # 418.) Accompanying the motion was a post-hearing brief related to the alleged perjury of Joseph Purtell and a supporting affidavit. (Dkt. ## 419 & 420.) On the same day, the court issued its order denying Defendant Grisel's motion for new trial and granting in part and denying in part Defendant Mikell's motion for reconsideration. (Dkt. # 417.) The Government's motion, brief and affidavit do not in substance or in form purport to seek reconsideration of the court's July

12, 2005 order, nor could they reasonably have been so intended, having been filed on the same day as the order. Indeed, the docket indicates that the court's order was filed at 3:48 p.m., and the Government's motion was filed at 4:09 p.m. (*See* Notices of Electronic Filing ("NEFs") for Dkt. ## 417 & 418.) It is obvious that upon receipt of the July 12, 2005 order, the Government did not immediately read the 25-page opinion, draft its motion and supporting brief, obtain an affidavit of Joseph Purtell, and file all the assembled documents just twenty-one minutes after the order. The motion, brief, and supporting affidavit were prepared prior to the issuance of the court's order and were filed simultaneous with the docketing of the court's order.

Nonetheless, Defendant Grisel urges this court to construe the Government's July 12, 2005 motion as a motion seeking reconsideration of the court's July 12, 2005 order, and presents his motion seeking leave to file a response to the Government's motion. (*See* Def. Grisel's 8/2/05 Mot., Dkt. # 422.) No proposed response accompanied this motion. Defendant Grisel subsequently filed another motion, again requesting an opportunity to file a response brief to the Government's July 12 motion, which Defendant Grisel again contends should be construed as a motion for reconsideration. (Def. Grisel's 9/12/05 Mot., Dkt. # 426.) As with the August 2, 2005 motion, no proposed response brief accompanied Defendant's September 12, 2005 motion. Thereafter, the Government filed a response to Defendant Grisel's motion, in which it stated, not surprisingly, that at the time it filed the July 12 motion it had not received the court's July 12 order. (Gov't.'s 9/27/05 Resp. at 2.) The Government explained that its July 12 motion was simply an

attempt to place further evidence or argument before the court prior to the court's ruling on the merits of the motion for new trial based on the Green and Purtell testimony, an attempt which was, of course, to no avail given the timing referred to above. The Government urges the court to deny Defendant Grisel's request to further expand the record on a matter which has been closed. Finally, on October 17, 2005, Defendant Grisel filed an untimely[4] reply brief, in which it essentially sought reconsideration of this court's July 12, 2005 order.[5]

The court will deny Defendant Grisel's August 2 and September 12 motions to file a response to what Grisel characterizes as the Government's July 12, 2005 motion for reconsideration. The July 12, 2005 motion was not an "unusually styled Motion for Reconsideration," as Defendant Grisel would have this court believe. (*See* Def. Grisel's 10/17/05 Reply at 9.) It was, instead, only what it was labeled, a motion to submit a post-hearing brief for the court's consideration in ruling on the motion for new trial based on the Green and Purtell testimony. Further, inasmuch as this court did not consider the material

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[4] By application of the Federal Rules of Civil Procedure and the local rules, Defendant's reply was due, at the latest, on October 11, 2006. *See* Fed. R. Civ. P. 6; E.D. Mich. LR 6.1 & 7.1(2)(C).

[5] The court will not construe Defendant Grisel's reply brief, filed through counsel, as a motion for reconsideration. Had Defendant Grisel desired to file such a motion, his counsel should have filed it consistent with the local rules and within ten days of the issuance of the court's July 12, 2005 order. *See* E.D. Mich. LR 7.1(g)(1). The court does not encourage back-door attempts to revisit closed issues.

submitted in the Government's July 12, 2005 motion before issuing the July 12, 2005 order – or, indeed, for any purpose – justice does not require the submission of a response by Defendant Grisel. Defendant's motions will be denied.

B. Motion for Reconsideration of November 18, 2004 Order

1. July 12, 2005 Order

In the court's July 12, 2005 order, granting in part and denying in part Defendant Mikell's motion for reconsideration, the court rejected Mikell's argument that a reversal of Defendants' convictions was mandated as a matter of law under *Holloway v. Arkansas*, 435 U.S. 475 (1978), but ordered that an evidentiary hearing should be conducted in order to determine whether the court's November 18, 2004 order should be vacated.[6] (7/12/05 Order at 24.) Citing *Mickens v. Taylor*, 535 U.S. 162, 168 (2002), the court held:

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[6] In light of this holding, the court declines to revisit the *Mickens/Holloway* issue. Defense counsel has, to some extent, utilized the August 2005 evidentiary hearing to reiterate the assertion that prejudice should be presumed in this case and a new trial mandated. As outlined in this court's July 12, 2005 order, however, the purpose of the evidentiary hearing was to allow the parties to present further evidence which could potentially impact this court's November 18, 2004 order. (7/12/05 Order at 24.) It was for this limited purpose that the court conducted the two-day hearing in August of 2005. The court will not allow the parties to use the hearing to argue the merits of this court's legal conclusion in its July 12, 2005 order that under *Mickens* prejudice was not presumed. (7/12/05 Order at 22-24.)

The court is not convinced that Defendant Mikell is automatically entitled to a new trial in this case based on the court's failure to consider or probe the alleged conflict of interest in 1999, and it will order an evidentiary hearing. This is not a case where the court *forced* counsel with an alleged conflict to continue representing a party. *See Mickens* 535 U.S. at 168 (*Holloway* [*v. Arkansas*, 435 U.S. 475 (1978)] creates an automatic reversal rule *only* where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict."). In this case, the court *permitted* the withdraw of the attorney allegedly conflicted once this issue was presented to the court and did not *force* continued representation, making it similar to those cases where courts have neglected a duty to inquiry about a conflict.[7] See id. at n. 3; *Wood v. Georgia*, 450 U.S. 261 (1981) (remanding for lower court inquiry).

Defendant Mikell argues that the court's failure to conduct an inquiry into the potential self-interest conflict of his co-counsel at trial, triggers the automatic reversal rule presuming

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[7] For this reason, the court also rejects Defendant Mikell's argument that *McFarland v. Yukins*, 356 F.3d 688 (6th Cir. 2004) is directly applicable to the facts of this case. Contrary to the facts of this case, in *McFarland* the defendant, "like the *Holloway* petitioners, was forced, over her objection to go to trial with counsel who was actively representing a co-defendant." *Id.* at 714. The Sixth Circuit held that "*[f]orcing* McFarland to go to trial with conflicted counsel contradicts the clearly established precedent of *Holloway v. Arkansas*." *Id.*

prejudice. In essence, Mikell points to the court's failure to inquire as the reason to presume prejudice. As the Sixth Circuit has explained, however, in *Mickens*, the Supreme Court "rejected the approach of several circuits which determined that a trial court's failure to inquire into a conflict of interest compels automatic reversal of the conviction." *Moss*, 323 F.3d at 471. The Court "held that the trial court's failure to inquire into a potential conflict of interest on the part of the defendant's attorney, about which *the court knew* or reasonably should have known, does not automatically require reversal of the conviction." *Id.* (emphasis added). The *Mickens* Court explained:

> [A] proposed rule of automatic reversal when there existed a conflict that did not affect counsel's performance, but the trial judge failed to make the *Sullivan* mandated inquiry, makes little policy sense . . . . The trial court's awareness of a potential conflict neither renders it more likely that counsel's performance was significantly affected nor in any way renders the verdict unreliable. Nor does the trial judge's failure to make the *Sullivan* mandated inquiry often make it harder for reviewing courts to determine conflict and effect, particularly since those courts may rely on evidence and testimony whose importance only becomes established at trial.

> *Mickens*, 535 U.S. at 172-73. As Supreme Court Justice Anthony Kennedy noted in his concurring opinion, "[t]he constitutional question must turn on whether trial counsel had a conflict of interest that hampered the representation, *not* on whether the trial judge should have been more assiduous in taking prophylactic measures." *Id.* at 179 (Kennedy, J., Concurring) (emphasis added). Inquiring about the conflict at this stage of the proceedings will avoid any such neglect by the court and will afford Defendants an opportunity to establish whether an actual conflict existed and whether it adversely impacted their trial.
>
> Conducting an evidentiary hearing regarding the alleged conflict at this stage cuts against Mikell's argument that the court failed to inquire about an actual conflict. While the court did not originally pass on the motions for mistrial based on this alleged conflict in 1999, it granted Defendants' motions for acquittal, thus, in the court's prior view, obviating the need to do so. Had the court denied Defendants' motions for acquittal, the court could have examined the pending motions for mistrial and, under existing law, conducted an inquiry into the alleged conflict and its impact on the representation of Defendant Mikell.

(7/12/05 Order at 22-24.) Accordingly, the court granted Defendant's motion for reconsideration only "inasmuch as the court will hold an evidentiary hearing and render a determination of whether to vacate its November 18, 2004 'Order Denying Defendants' Motion for New Trial.'" (*Id.*)

2. Evidentiary Hearing[8]

During the two-day evidentiary hearing in August of 2005, Defendants presented testimony, most of which was either largely irrelevant to the limited issue before the court or duplicative of evidence already presented to the court. Further, much of the evidence consisted of testimony explaining matters which could be found on the court's docket or were otherwise matters of public record. None of the evidence is sufficient to persuade the court that its November 18, 2004 order should be vacated or in any way modified.

First, Defendant Mikell called attorney Steve Harris as a witness. Among other topics, Mr. Harris testified regarding his representation of Defendant Mikell, both in this case and in previous matters, including matters related to Walter Hacker. Mr. Harris confirmed that, along with Harold Gurewitz, he operated as co-counsel to Defendant Mikell in this criminal matter, and was questioned regarding his responsibilities in that role. Throughout his testimony, Mr. Harris consistently stated that his recollection was

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[8] The court notes preliminarily that there was some discussion at the beginning of the hearing as to whether the Assistant United States Attorney assigned to this case, James A. Brunson, could be called to testify. After hearing argument from both sides on the issue, the court found that calling Mr. Brunson as a witness against his wishes would be an "unnecessary complication" in this case, when the heart of what Defendants wished to elicit from Mr. Brunson could be found on this court's docket or submitted via written or oral proffer. While defense counsel suggests that live testimony would "fill in the mortar" surrounding the essential facts which are a part of the record, the court reiterates now that such live testimony from the Assistant United States Attorney of record is not necessary under the particular facts of this case.

not clear and that he would rely on court papers or transcripts to answer the questions posed to him. Mr. Harris did recall that a chart was used during the criminal trial which indicated that his firm was paid out of the sale of the Real Pinconning Cheese ("RPC") cheese inventory. Mr. Harris also testified that his role in the trial of this case would, in some ways, benefit both Defendant Mikell and Defendant Grisel. Nonetheless, when questioned further regarding his duties as co-counsel to Defendant Mikell, Mr. Harris could not state with any degree of reliability how the questioning of the witnesses was allocated and how the work was divided. Mr. Harris, however, testified that Mr. Gurewitz operated as lead counsel and therefore had the "prominent" role as counsel in the trial. (*See* 8/17/06 Tr., Harris Test.)

Next, Agent Craig Georgeff testified. Agent Georgeff principally testified regarding the issuance and execution of various search warrants in connection with the investigation of this criminal matter. Specifically, Agent Georgeff testified that he was personally present during the execution of the search warrant at Defendant Grisel's home and office in Dallas, Texas. Agent Georgeff testified that during the execution of that search warrant, Defendant Grisel was allowed to make a private telephone call, and that after he made the call he told Agent Georgeff that he had called Steve Harris, his attorney in Tulsa.[9] Agent Georgeff insisted quite emphatically in response to

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[9] This exchange was discussed in this court's November 18, 2004 order. (*See* 11/18/04 Order at 10-12.) Nothing in Agent Georgeff's August 17, 2005 testimony materially impacts this court's conclusions in its November 18, 2004 order.

questioning by Defendant Grisel's attorney, that the name Defendant Grisel gave was "Steve Harris," not "Randy Duncan." Agent Georgeff further testified that this name was witnessed by another agent and memorialized in his report, a copy of which was supplied to Mr. Gurewitz and David B. Herrington (Defendant Grisel's trial counsel) thirteen months prior to trial. Moreover, Agent Georgeff denied that Mr. Harris ever "figured largely" in the investigation of this case, but that Agent Georgeff understood Mr. Harris's role to be only an attorney to Defendant Mikell or Defendant Grisel, or to a combination of both of them. (*See* 8/17/06 Tr., Georgeff Test.)

Defendant Grisel next called Daniel Opperman to testify. Of primary importance to the inquiry before the court, Mr. Opperman explained his statement to Joseph Purtell, discussed in this court's November 18, 2004 order that Mr. Harris was "calling the shots" in connection with the civil litigation between National Farmers Organization Dairy Custodial Account ("NFO") and RPC. (*See* 11/18/04 Order at 9-10.) Mr. Opperman testified that this statement referred to Mr. Harris's role with respect to the litigation's legal strategies, not with respect to the underlying transactions which formed the basis of that litigation. He also testified that the statement referred to one particular legal strategy, regarding the decision to depose Mr. Purtell. When questioned further about particulars of the litigation and certain events that occurred, Mr. Opperman testified that his memory regarding those events was "average at best." (*See* 8/17/06 Tr., Opperman Test.)

Finally, Defendant Grisel testified. Much of Defendant Grisel's testimony was irrelevant to the

specific issue before the court, and appears to the court as an attempt to insert "evidence" into the record to set the stage for possible arguments on appeal or on collateral review. Defendant Grisel testified regarding his understanding of Mr. Harris's role in the criminal case. He stated that at times he personally followed Mr. Harris's legal advice and that his court appointed attorney primarily followed Mr. Harris's lead, especially with respect to the portions of the trial directed at the law of secured transactions. The obvious intended implication of Defendant Grisel's testimony was the sentiment that when Mr. Harris withdrew, Defendant Grisel was in essence left without counsel. Defendant Grisel further testified that during the execution of the search warrant on his home and office he telephoned Randy Duncan, not Mr. Harris. Defendant Grisel was further questioned by Mr. Gurewitz regarding Mr. Harris's past representation of Defendants Mikell and Grisel.

After the conclusion of Defendant Grisel's testimony, Mr. Gurewitz discussed a document with sixteen numbered sections, which he proceeded to summarize for the court. (*See* 8/17/05 "Summary of Evidence," Dkt. # 423.)[10] Mr. Gurewitz also argued

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[10] The Government filed a written response to the "Summary of Evidence" on September 2, 2005. (*See* Dkt. # 424.) The Government's response did not significantly disagree with most of Defendant's "Summary of Evidence." The most substantial disagreement occurred with respect to paragraphs 12 and 14-16. Nonetheless, the Government's disagreement was primarily directed at Defendant's citations to court transcripts, which are matters of record. More fundamentally, both parties' filings are essentially written memorializations of their arguments during the evidentiary hearing. For this reason, the court will not strike

that fundamentally the issue before the court was whether Defendant Mikell received a fair trial, which Mr. Gurewitz argued he did not. Mr. Gurewitz argued that one reason for this was the withdrawal, mid-trial, of Mr. Harris. This withdrawal, according to Mr. Gurewitz, was not adequately explained to the jury. Mr. Gurewitz also argued that the Government must have known that Mr. Harris's involvement in the factual transactions of this case would become an issue at trial, because the Government intended to introduce Exhibit number 532,[11] and therefore must have considered the possibility of the crime fraud exception as a basis for introducing a letter from an attorney to a client. Further, Mr. Gurewitz argued that when the Government accused Mr. Harris as being an unindicted co-conspirator, everything in the case had to be looked at in a different light, including and must significantly, the waiver of the advice of counsel defense. Mr. Gurewitz also suggested that Mr. Harris perhaps did not conduct proper re-direct examinations based upon his purported role as an unindicted co-conspirator, and concluded by again arguing that Defendant Mikell was automatically entitled to a new trial under *Holloway v. Arkansas*, 435 U.S. 475 (1978).

On behalf of Defendant Grisel, Mr. Blake Atkin argued that Mr. Harris essentially operated as counsel to both Defendant Mikell and Defendant Grisel, and

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Defendant's "Summary of Evidence," as requested by the Government. Both parties have thoroughly placed their positions on the record.

[11] Exhibit Number 532 was a letter concerning the "Hacker Investment/transactions," sent by Mr. Harris to Defendants Mikell and Grisel. (*See* 11/18/04 at 13.)

thus Defendant Grisel is equally entitled to a new trial based on the alleged prejudice associated with Mr. Harris's conflict of interest. Mr. Atkin adopted Mr. Gurewitz's argument relating to the waiver of the advice of counsel defense, stating that Mr. Harris should have warned Defendants Mikell and Grisel not to waive that defense and that his alleged failure to do so resulted from his conflict of interest. At that point, Mr. Atkin's argument seemed to veer off-topic to an extent, addressing an alleged violation of Mr. Grisel's constitutional right to remain silent. Mr. Atkin further reiterated the testimony of Mr. Grisel to the effect that once Mr. Harris withdrew from the case, Mr. Grisel was essentially left without counsel. Mr. Atkin concluded by arguing that the Government improperly implicated Mr. Harris and thus improperly "derailed" the case. (*See* 8/18/06 Tr., Atkin Argument.)

The Government presented its closing argument, asserting that the Defendants' position with respect to Mr. Harris's alleged self-interest conflict has evolved. According to the Government, Defendants initially argued that the Government should not have made the accusations against Mr. Harris, but now they have taken the position that Mr. Harris indeed had a conflict which mandates a new trial. The Government suggests that the contradictory nature of these assertions confirms that the Harris situation was invited error, about which the Government claims to have been concerned since it first raised Harris's problematic involvement in the case prior to trial. The Government argued that Mr. Harris was involved in this case factually, and the defense knew this from pre-trial discovery yet allowed him to remain as Mr. Mikell's counsel. The Government reiterated its contention that the defense's decision to keep Mr.

Harris as co-counsel was a device for obtaining post-trial relief in the event of a conviction, despite the fact that there was a waiver of any conflict as a result of Mr. Harris's involvement in the case. The Government also argued that any allegation that Mr. Harris did not adequately examine Mr. Green because of his alleged conflict of interest cannot be sustained; instead, the Government argued that Mr. Green was a difficult witness who "Clarence Darrow himself" would have had difficulty examining. (8/18/06 Tr., Gov't Argument.) Indeed, the Government pointed out that Mr. Herrington likewise did not cross examine Mr. Green and that if Mr. Gurewitz thought that Mr. Harris should have further examined Mr. Green he could have insisted that Mr. Harris do so. The Government next argued that the case law supports its position that a conflict does not arise until the attorney knows about an actual conflict. To that end, the Government stressed Mr. Harris's testimony that the conflict arose on April 12, 1999, at which point Mr. Harris voluntarily withdrew. The Government concluded by arguing that here the waivers were solid, that any error was invited error, and that, if Defendants had desired further assistance from Mr. Harris, they could have at least asked for such assistance or for an adjournment to seek alternative assistance.

Defendants were allowed a final chance to make any rebuttal argument. Mr. Gurewitz reasserted his position that a self-interest conflict existed prior to April 12, 1999, which was the date that the Government affirmatively accused Mr. Harris of being an unindicted co-conspirator. Mr. Gurewitz re-asserted that the Government must have known of this conflict well before trial, inasmuch as it intended to introduce

Exhibit 532 and must have thought of the crime-fraud exception to the attorney client privilege as a vehicle by which to attempt to introduce the exhibit. Mr. Gurewitz argued that Mr. Harris's conflict and withdrawal had a negative impact on the defense's case, both respect to the Green and Purtell examination and also with respect to the effect Mr. Harris's disappearance had on the jury. Mr. Gurewitz argued that the alleged prejudice suffered as a result of the Harris conflict existed even though Mr. Harris co-counsel along with Mr. Gurewitz. In response to questions from the court, Mr. Gurewitz argued that the Government should have made its "unindicted co-conspirator" allegation prior to trial, and that the Harris conflict was not fully waived in that Mr. Harris was not present when Defendant Mikell waived the defense.

Finally, Mr. Atkin argued briefly that Mr. Harris's departure was such an "unusual circumstance" that it necessarily negatively impacted the defense's case. (8/18/06 Tr., Atkin Argument.)

3. Analysis

Having reviewed all of the submitted materials, previous orders of the court, and the transcript of the two-day evidentiary hearing, and having fully considered the parties' arguments and positions, the court will decline to modify its November 18, 2004 order. The court finds that the evidence submitted during the August 2005 evidentiary hearing does not materially affect this court's conclusion in its November 18, 2004 order that a new trial was not warranted due to the Harris conflict issue.

Defendants seem to be arguing that (1) the Government improperly introduced evidence relating to Mr. Harris and unfairly suggested that he stood as an unindicted co-conspirator, and also that (2) Mr. Harris's conflict of interest, in his alleged role as an unindicted co-conspirator, created an unfair trial because of his purported lack of zealous representation. These two positions are, to a large extent, contradictory. It appears that Defendants are not entirely sure whether they want to argue that Mr. Harris indeed labored under a conflict of interest or whether they want to argue that the Government improperly painted Mr. Harris as such. Because Defendants do not definitively take a position on this issue, it appears to the court that they are attempting to lay a factual basis for *both* positions, and preparing what might be, or likely will be, revisited on appeal.

In any event, the testimony presented during the evidentiary hearing does not alter this court's earlier findings, and the court here reaffirms that any error as a result of the Harris conflict and withdrawal was invited error. Further, Defendants have not sufficiently pointed to specific instances of alleged prejudice which resulted from the Harris conflict.[12]

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[12] The court finds the facts of this case to be significantly distinguishable to the facts of *United States v. Tatum*, 943 F.2d 370 (4th Cir. 1991), on which Defendant Mikell relied heavily during the evidentiary hearing. Aside from the fact (as even Mr. Gurewitz acknowledged) that *Tatum* is a pre-*Mickens* case, the defendant in *Tatum* pointed to specific instances where the attorney's conflicts adversely impacted the defendant's case. *Id.* at 377 ("The identified failures to seek a plea bargain, to crossexamine Greene critically, to be able to call himself as a witness on the lost file, and to attempt to shift liability from

Indeed, Mr. Harris himself could not state with any degree of reliability how the work was divided. Moreover, Mr. Harris testified that it was Mr. Gurewitz who operated as lead counsel to Defendant Mikell and therefore had the "prominent" role as counsel in the trial. Likewise, whether or not Defendant Grisel relied on Mr. Harris's advice, he also had his own attorney, Mr. Herrington, who operated as his court-appointed, and undoubtedly primary, attorney.

Neither did Agent Georgeff's testimony enhance Defendants' positions. Agent Georgeff testified consistent with how he testified at trial and how this court summarized in its November 18, 2004 order. More significantly, Agent Georgeff testified during the evidentiary hearing that he provided a copy of his report to Defendants thirteen months prior to trial. This even further bolsters this court's conclusions that, first, the Government did not sandbag Defendants on the Harris issue and that, second, both Defendants well knew about Harris's entanglement in the facts prior to trial. The court also finds that Mr. Purtell's testimony did not affect this court's November 18, 2004 order, and Mr. Grisel's testimony was, in addition to being largely self-serving, largely irrelevant to the issues currently before the court.

Tatum to others constituted 'actual lapses' in legal representation.") (citing *Cuyler v. Sullivan*, 446 U.S. 335, 349(1980)). Here, despite Defendants' attempts to argue that Mr. Harris's examinations of Mr. Green and Mr. Purtell were deficient, the claimed errors do not even approach the degree of certainty and specificity which were present in *Tatum*.

Simply put, the court will not alter its conclusion that Defendants invited any error associated with the Harris issue. The Government did all that it reasonably could to disqualify Mr. Harris prior to trial, trying to avoid exactly the fracas that is now before the court. Defendants vigorously resisted the Government's efforts and succeeded in persuading this court to permit Harris to serve. They must abide their success.

Further, Defendants do not allege with any degree of particularity any specific prejudice that occurred as a result of Mr. Harris's alleged self-interest. The court is not convinced that, with Mr. Gurewitz and Mr. Herrington in primary control of Defendants' cases, the examinations of Mr. Green or Mr. Purtell were conducted improperly or deficiently as a result of Mr. Harris's conflict. Indeed, as this court found in its November 18, 2004, order, Mr. Harris's purported self-interest was, if anything, almost perfectly aligned with Defendants' interest in obtaining an acquittal.

While Defendants' counsel, and in particular Mr. Gurewitz, has presented the court with passionate arguments regarding the alleged unfairness of the criminal trial, the court is not persuaded. Accordingly, after carefully reviewing the submitted material, the court will deny the December 3, 2004 "Motion for Reconsideration."

IV. CONCLUSION

IT IS ORDERED that Defendant Grisel's August 2, 2005 "Motion for Leave of the Court to File Response to Government's Post-Hearing Brief and for Hearing" [Dkt. # 422] and September 12, 2005 "Motion for

Hearing on Defendant Grisel's Request for Leave to File Response to Government's Post-Hearing Brief . . ." [Dkt. # 426] are DENIED.

IT IS FURTHER ORDERED that Defendant Mikell's December 3, 2004 "Motion for Reconsideration" [Dkt. # 391], in which Defendant Grisel joined on December 9, 2004 [Dkt. # 393] is DENIED.

Finally, IT IS ORDERED that the court will conduct a status conference in chambers with counsel only on June 12, 2006 at 2:30 p.m. The court will order an update to the presentence reports. Counsel should be prepared to outline specifically what else might be needed in preparation for sentencing.

S/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: May 16, 2006

[certificate of mailing omitted]

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 97-CR-81493-DT

[Filed July 12, 2005]

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALAN MIKELL and CHRISTOPHER GRISEL,

Defendants.

ORDER DENYING DEFENDANT GRISEL'S MOTION FOR NEW TRIAL OR ACQUITTAL BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL AND NEWLY DISCOVERED EVIDENCE OF PERJURY
AND
GRANTING IN PART AND DENYING IN PART DEFENDANT MIKELL'S "MOTION FOR RECONSIDERATION OF ORDER DENYING MIKELL'S MOTION FOR NEW TRIAL"

On November 15, 1999, Defendant Grisel filed a *pro se* motion titled "Motion to Replace Counsel." In his motion, Defendant sought to present several allegedly prejudicial errors during his criminal trial and identified certain "areas of immediate concern," including "[t]he Motion concerning NFO's representatives' misrepresentations at trial" and "[t]he Motion concerning Ineffective Assistance of Counsel." (Def.'s 11/15/99 Mot. at 2.) After granting several motions for acquittal, the court denied as moot Defendant Grisel's "Motion to Replace Counsel." *United States v. Mikell*, 163 F. Supp. 2d 720, 743 (E.D. Mich. 2001). This November 15, 1999 motion is now before the court following an appeal to the Sixth Circuit Court of Appeals, an October 21, 2004 hearing on remand, and a subsequent substitution of counsel.[1]

On February 22, 2005, Grisel's new counsel filed a supplemental brief in support of this motion, seeking a new trial or entry of acquittal. The Government filed a written response on April 25, 2005 and Defendant

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[1] During the October 21, 2004 hearing, recognizing that the motion had been previously deemed moot based on the granting of motions for acquittal, the court asked Grisel's counsel Mr. Douglas Mulkoff, whether in his professional opinion the November 15, 1999 *pro se* motion presented issues that needed to be addressed by the court on remand. (Def.'s Supp. Br. Ex. A, 10/21/04 Hearing Tr.) Mr. Mulkoff asked the court to review and rule on Grisel's motion. (*Id.*) The court expressed its concern and unwillingness to rule on a pending *pro se* motion when the defendant was represented by counsel. As such, the court stated it was inclined to deny without prejudice whatever had been filed *pro se* and permit counsel "to give independent attention, and, as an officer of the Court, to advance those motions that are rationally able to be advanced." (*Id.*) The court instructed Mr. Mulkoff to do so with reasonable diligence.

Grisel filed a reply on May 9, 2005. Defendant Mikell filed a notice of joinder in Defendant Grisel's motion and supplemental brief for a new trial with respect to sections I-III. Oral argument was held on June 30, 2005. For the reasons set forth below, the court will deny Defendant Grisel's motion.

Defendant Mikell's December 3, 2004 "Motion for Reconsideration of Order Denying Mikell's Motions for New Trial" also remains pending before the court. After receiving the Government's written response to Mikell's motion for reconsideration, the court held a hearing, on February 11, 2005, to discuss the prospect of conducting an evidentiary hearing to determine whether Defendant Mikell's co-counsel, Steven Harris, labored under an actual conflict of issue at trial and whether such a conflict adversely impacted Mikell's representation.

During this February 11 hearing, counsel for Mikell and the Government recorded their positions on the need for an evidentiary hearing on the alleged self-interest conflict of Mikell's co-counsel. The court, however, was also informed by Defendant Grisel's local counsel that Grisel had obtained new counsel and that a substitution was forthcoming. Based on this representation, the court determined that it would provide an opportunity for Grisel's new counsel to express a formal position on the need for an evidentiary hearing on the alleged conflict of interest between Mr. Harris and Defendant Mikell. Defendant Grisel has done so in his reply in support of his motion for a new trial based on newly discovered evidence of perjury. Defendant Grisel, like the Government, argues that an evidentiary hearing is required on the alleged conflict of interest. (Def. Grisel's 05/09/05

Reply at 8-10.) For the reasons stated below, the court will grant in part Defendant Mikell's motion for reconsideration and hold an evidentiary hearing.

I. BACKGROUND

The factual and procedural background leading to the current posture of this case is complex. Much of it has been set forth in this court's published opinion granting Defendants' motions to acquit after a jury verdict for improper venue and for insufficient evidence, and in the Sixth Circuit's decision reversing the court's judgment of acquittal as to counts 1 through 7 of the fifty-two count Second Superseding Indictment (returned by the grand jury on May 27, 1998). *See United States v. Mikell*, 163 F. Supp. 2d 720 (E.D. Mich. 2001); *United States v. Mikell*, 84 Fed.Appx. 485, 486, 2003 WL 22976438 (6th Cir. Dec. 1, 2003).[2]

Defendants Mikell and Grisel were the owners of Real Pinconning Cheese ("RPC") in Pinconning, Michigan. On September 26, 1995, RPC entered into an agreement to purchase milk from National Farmers Organization Dairy Custodial Account ("NFO"). Because RPC already owed NFO approximately $1,000,000.00 for previously shipped milk, NFO agreed to ship additional milk only under certain conditions: namely, a collateral pledge and security agreement whereby RPC could be held in default for failure to remain current on milk payments and whereby NFO

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[2] On the current record, Defendant Grisel stands convicted of Counts 1-6 of the second superceding indictment, while Defendant Mikell stands convicted of Counts 1-5 and 7.

could obtain a security interest in RPC's cheese inventory.

By January 1996, RPC owed NFO approximately $2,400,000.00 (including the previous $1,000,000.00 debt) for unpaid milk invoices. NFO then notified Defendants that it was holding RPC in default and exercising control of the collateral, that is, approximately 771,338 pounds of cheese which was then warehoused at, and/or in transit to, Pinconning.

After receiving formal notification that they were being held in default, Defendants devised a scheme whereby they could avoid their obligations to NFO without themselves suffering financially. First, Defendants sold the cheese to Nor-Tech Dairy Advisors, Inc. ("Nor-Tech"), which was located in South Dakota and owned by Ronald Hines. Although the Pinconning cheese was almost entirely grade "A," and at the time worth approximately $1.35 to $1.40 per pound, Defendants sold the cheese to Nor-Tech at a mere $0.25 per pound. A companion agreement required Hines to quickly resell the cheese back to Defendant Grisel's company, Innoquest, for $0.30 per pound plus shipping costs. Grisel, through Innoquest, then resold the cheese to a company called Sorrento at $1.40 per pound and a second entity named E.J. Marketing for an average of $1.36 per pound. RPC was only required to pay NFO the money from the initial sale of cheese to Nor-Tech, which was priced at $0.25 per pound and not at the then-prevailing market value.

In an effort to conceal the transaction between Hines and Innoquest, Defendant Grisel directed Sorrento and E.J. Marketing to send the majority of

payments for the cheese to Nor-Tech, rather than to Innoquest directly. Hines then forwarded this money to Innoquest, who disbursed some of the money to Defendant Mikell and others. Defendants withheld the details of their below market sales to Nor-Tech and resale to Innoquest from NFO, enabling them to divert more than $700,000.00 from their secured creditor.

As a result of Defendants' actions, a grand jury charged Mikell and Grisel in a fifty-two count Second Superceding Indictment with, *inter alia*, mail fraud, wire fraud, money laundering, and conspiracy. The criminal conduct chiefly at issue concerns Mikell and Grisel's self-dealing to defraud secured creditor NFO by diverting the value of the cheese inventory from NFO in the closing days of Defendants' cheese business. After a lengthy trial, the jury returned guilty verdicts against Defendants on numerous counts.

Subsequently, this court granted Defendants' motions for acquittal under Federal Rule of Criminal Procedure 29. *Mikell*, 163 F. Supp. 2d at 743. The court ruled that the Government failed to prove that the object of Defendants' scheme was money or property with value and that the government failed to establish venue regarding some of the verdicts. The United States appealed only the court's decision as it related to dismissal of counts based on insufficient evidence, not the venue rulings. On December 1, 2003, the Sixth Circuit reversed this court's order granting the Rule 29 motions for acquittal based on insufficient evidence and remanded the case for the court to consider "Defendants' two unconsidered motions ask[ing] the district court to order a new trial . . . ." *Mikell*, 84 Fed.Appx. at 489. This case is again before the court after the United States Supreme Court

denied a petition for a writ of certiorari and after the Sixth Circuit mandates were issued.

II. DEFENDANT GRISEL'S MOTION FOR NEW TRIAL BASED ON INEFFECTIVE ASSISTANCE AND NEWLY DISCOVERED EVIDENCE OF PERJURY

Federal Rule of Criminal Procedure 33 governs motions for a new trial. It provides, in relevant part, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). A decision to grant or deny a motion for a new trial under Rule 33 lies within the discretion of the district court. *See United States v. Lattner*, 385 F.3d 947, 958 (6th Cir. 2004) ("The district court's denial of a motion for new trial is reviewed under an abuse of discretion standard.") (citing *United States v. Gaitan-Acevedo*, 148 F.3d 577, 589 (6th Cir. 1998)).

"[M]otions for a new trial based on newly-discovered evidence are disfavored and should be granted with caution." *United States v. Glover*, 21 F.3d 133, 138 (6th Cir. 1994); *see also United States v. Dupree*, 323 F.3d 480, 488 (6th Cir. 2003). A motion for a new trial based on newly discovered evidence should be granted only where: (1) the new evidence was discovered after trial; (2) the evidence could not have been discovered earlier with due diligence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence would likely produce an acquittal. *United States v. Braggs*, 23 F.3d 1047, 1050 (6th Cir. 1994); *United States v. O'Dell*, 805 F.2d 637, 640 (6th Cir. 1986).

A criminal defendant bears the burden of demonstrating the need for a new trial, and such motions should be granted sparingly. *United States v. Seago*, 930 F.2d 482, 488 (6th Cir. 1991). Newly discovered evidence does not include new legal theories or new interpretations of the legal significance of evidence previously presented. *United States v. Olender*, 338 F.3d 629, 635 (6th Cir. 2003).

Defendant Grisel cites two instances of alleged newly discovered perjury in support of his motion. First, Defendant identifies the alleged false testimony of NFO counsel Richard Green where Green claimed he had not advised NFO in regard to cashing the proceeds check from the sale of the cheese it received in February 1996, the event extinguishing the security interest held by NFO. Second, Defendant claims that lawyer Joseph Purtell committed perjury when he testified that NFO had not filed civil claims against Defendants mirroring the criminal prosecution, when in fact, prior to his testimony, he had filed a civil case against Defendants and was lead counsel in that matter. Defendant Grisel further cites a motion for an extension of a summons in that civil case to support his claim that Purtell was delaying service on Defendants to avoid disclosure of the civil suit.

The Government makes principally three arguments in response. First, it argues that Defendant Grisel's November 1999 "Moton to Replace Counsel" is mooted because Grisel obtained the relief requested when Mr. Melvin Houston was substituted as counsel to handle his appeal. Second, it argues that Grisel has waived his right to file the motion because he has failed to exercise "reasonable diligence" in presenting the motion to the court. The Government notes that

Grisel was instructed to present his motion on remand by counsel on October 21, 2004, but the current supplemental brief was not presented to the court until March 2005. Third, the Government argues that Defendant Grisel has not meet his burden to establish the four requirements to warrant a new trial based on newly discovered evidence.

A. Newly Discovered Evidence

Joseph Purtell's Testimony

The relevant testimony of Joseph Purtell was elicited on March 8, 1999 on cross examination. (Gov.'s Resp. at Ex. A, Trial Tr. Vol. VIII at 3-9.) It reads as follows:

Cross Examination Continued by Mr. Harris:

> Q: Mr. Purtell, I want to take you back to a time period a little bit before the preparation of the lawsuit which I think occurred on January 13th, Sunday being January 14, 1996. Had you been involved on behalf of your clients, other clients, associated with business transactions that involved the cheese plant or any of the predecessor entities?
> A: No, not to my knowledge.
>
> Q: At one time you were the city attorney for the city of Pinconning?
> A: No.
>
> Q: Never?
> A: Never.

> Q: Okay. Can you give me an idea – although you're still legal counsel in the civil dispute of NFO v. Real Pinconning Cheese, correct?
> A: Correct.
>
> Q: What other lawsuits or litigation, past or present, were you an attorney with any of the entities associated with the cheese plant: Dore's, Paul's or Real Pinconning Cheese?
> A: I personally?
>
> Q: Well your law firm.
> A: I can't speak for the entire firm because there's nine attorneys in the firm. Myself, I was an attorney in the litigation of Dore's Pinconning Cheese, I'm not involved in that case anymore. Otherwise I personally have not been.

(*Id.*)

Notwithstanding this March 8, 1999 testimony, Defendant Grisel has presented evidence that on January 13, 1999, Mr. Purtell filed a civil complaint in Bay City Circuit Court on behalf of NFO and against Defendants arising from the alleged fraudulent cheese transactions. (Def. Grisel's Supp. Br. at Ex. B.) The caption of this state law civil action lists J. Joseph Purtell as attorney for Plaintiff and he signed the complaint. (*Id.*) Grisel also has presented evidence that Purtell filed an *ex parte* motion to issue a second summons in this state law civil case. (*Id.*) In this April 13, 1999 *ex parte* motion, Purtell averred that the Defendants were witnesses in a federal criminal trial and that "service upon them would be difficult or potentially exempt because of their attending or

returning to court relative to proceedings." (*Id.*) The motion sought the entry of an order from the state court to permit the issuance of a second summons. (*Id.*) The state civil case presented issues significantly similar to the issues in the federal criminal case, and Purtell denied, under oath, the existence of this parallel civil action that he had filed on NFO's behalf fewer than eight weeks previously.

Defendant Grisel argues that this evidence of Purtell's involvement in the civil case was not discovered until after trial, that Defendant could not have discovered it with reasonable diligence because Defendants were never served and Purtell filed a motion to extend NFO's time to serve them. Defendant also argues that knowledge of the existence of this civil case would have been material to the jury because of the bias the parallel state action would have demonstrated had it been exposed.

In short, the NFO witnesses' credibility would have been undermined by the parallel state civil action filed against Defendants and such evidence was completely in accord with a major defense theory of the case. One of the defense theories at trial was that NFO had driven Defendants out of business by its predatory pricing. Defendants attempted to show the jury that NFO was using the government to prosecute what was, in reality, a civil dispute between two private entities. This instance of alleged perjury is claimed to have significantly affected Defendant's ability not only to impeach Mr. Purtell, but also to present evidence to the jury on a key point in his defense theory, warranting a new trial.

In its written response, the Government fails to adequately address this alleged perjury associated with the 1999 civil action filed by Purtell against Defendants on behalf of NFO. The Government argues that Defendant's characterization of the testimony is "murky, and unfaithful to the record." (Gov't's Resp. at 4.) It also maintains that the record and above-cited testimony reveals no mendacity on behalf of Purtell. Lastly, the Government argues that Defendant Grisel knew, at the time of trial, Purtell had gone to the home of Bay County Circuit Judge Lawrence Bielawski seeking a temporary restraining order after learning that defendants were allegedly in the process of stealing cheese from the plant in Pinconning. (*Id.* at 5.)

Defendant, however, clearly focuses on the 1999 civil litigation (filed by Purtell in Bay City Circuit Court before Judge Kenneth W. Schmidt) not on Purtell's involvement in seeking a restraining order from Judge Bielawski. Second, the above-cited testimony shows that Purtell omitted any reference to the January 13, 1999 state case that he filed on behalf of his client against Defendants. On cross examination, Purtell was asked: "What other lawsuits or litigation, *past or present*, were you an attorney with *any of the entities associated with the cheese plant*: Dore's, Paul's or Real Pinconning Cheese?" (Gov't's Resp. Ex. B. at 3-4 (emphasis added).) He responded by indicating that he was not personally involved in any other lawsuits or litigation other than a 1996 case. He did so, however, with personal knowledge that he had filed for NFO a complaint against Defendants just weeks prior to his testimony at trial.

Richard Green's Testimony

The relevant testimony from Mr. Green occurred on May 14, 1999 during redirect examination and re-cross examination. It provides:

Direct Examination by Mr. Brunson:

Q: You're Richard A. Green?
A: Yes.

Q: You're the same Richard Green that testified earlier?
A: Yes.

Q: You're an attorney for NFO?
A: Yes.

Q: Mr. Green, did you ever recommend to NFO that they should accept the $186,000 representing the 25 cents a pound for the Nortech sale?
A: Never.

Q: Did you ever say that to anyone?
A: Never.

Q: Did you ever say anything remotely like that to anyone?
A: Never.

Q: Did you in any way ever hint or suggest to anyone that, well, maybe NFO ought to take 25 cents a pound for the 771,000 pounds of cheese and be done with it?
A: Never.

Q: Did you ever suggest that in writing or in any other form to anyone else?
A: No.

Q: Did you have contact with any attorney for Real Pinconning Cheese other than Mr. Opperman?
A: Not that I know of.

Q: Has there ever been a circumstance where someone could have overheard you saying that 25 cents a pound, that deal, was acceptable or worthy of consideration as far as NFO was concerned?
A: Never. I never even thought of it.

. . .

Cross Examination by Mr. Gurewitz:

Q: Mr. Green, I would like to see if I understand what you just said with regard to the receipt of NFO of money. Your testimony was you never recommended to NFO that it take the $186,000?
A: No, that is not in settlement, that's why–

Q: I didn't say anything about settlement, Mr. Green, I just said – I didn't mention the word – just take that amount of money when it was tendered?
A: No, I didn't have to. Nobody raised the question.

Q: No one ever asked you?
A: No, they took the money and put it in their account.

Q: Did you know it wasn't even $186,000?
A: I don't know the amount exactly.

(Def. Grisel's Reply at Ex. A.)

This testimony shows that Mr. Green stated that he never advised NFO to take the $186,000.00 at issue as nobody had "raised the question." (*Id.*) Defendant also argues that this testimony demonstrates that, to NFO, "deciding whether to cash the check was no big deal." (Def.'s Reply at 5.) Defendant Grisel contrasts the trial testimony with Mr. Green's July 29, 1999 post-trial "Supplemental Declaration of Victim Losses." (Gov't's Resp. Ex. B.) In his post-trial declaration, Green detailed NFO's losses for purposes of restitution, declaring in relevant part:

> Expenses and Costs. The Dairy Trust has also incurred expenses related to participation in the investigation and prosecution that the trustees believe should be included in the order of restitution, pursuant to 18 U.S.C. § 3663A(b)(4). While these items could include the time of NFO employees and related costs, the claim set forth here includes only legal fees and costs for services rendered by attorneys J. Joseph Purtell and John P. McKenna and by myself, which have been documented in our bills. Moreover, while our services could include a number of incidental matters, the claim focuses on two major matters: (a) our investigation of the facts and circumstances regarding the stunning news that the Dairy Trust was being paid only $186,670 for the cheese that we were led to believe would bring approximately $1,000,000, ending at the time we presented our findings to

> the federal law enforcement agents; and (b) our need to respond to the efforts of defendants Mikell and Grisel, undertaken once they learned of the federal criminal investigation, to establish their ultimately-discredited legal defense in the context of the Dairy Trust's case against RPC pending in the Michigan state court.
>
> (a) Investigation. This phase, which began on or about February 20, 1996, . . .

(Gov.'s Resp. Ex. B. at 2-3.) Green's declaration also showed that he spent 36.85 hours on this investigation. (*Id.* at 4.)

Defendant notes that Green's declaration shows that his investigation started on February 20, 1996, the very same day that the $186,670.00 cheese check was tendered to NFO. Defendant Grisel argues that Green's trial testimony conflicts with his declaration and that this inconsistency was critical to Grisel's defense.

Grisel's defense strategy included an argument that the decision by NFO to cash the check for the cheese was made after February 20, 1996 -- it was the cashing of the $186,670.00 cheese check that triggered the loss of NFO's security interest. Defendant argues that Green's trial testimony was less than candid, given the discovery of his approximately forty-hour investigation commencing on the date the check was tendered. (Def.'s Reply at 5.) Defendant Grisel argues that a new trial is warranted because the jury was denied complete and truthful testimony about the decision to cash the check. According to Grisel, "[h]ad [Green's]

trial testimony been [ ] candid the jury would clearly have seen that whatever fraud NFO claimed had deluded them to that point, was washed away by the time they decided to cash the check." (*Id.*)

Defendant Grisel also argues that this newly discovered evidence would likely result in an acquittal. According to Grisel, Defendants stand convicted of having defrauded NFO of its security interest in the cheese, but under the principles of the Uniform Commercial Code, that security interest was not lost until NFO cashed the check. *See* 18 U.S.C. § 1343; *United States v. Mikell*, 84 Fed.Appx. 485, 2003 WL 22976438 (6th Cir. Dec. 1, 2003).[3] The newly discovered evidence that NFO commenced a 40-hour investigation before cashing the check goes to the heart of whether NFO knew what it would be paid for the cheese before it gave up its security interest, the "money or property" element of the § 1343 offenses. *See Mikell*, 84 Fed.Appx at 489 (holding that the jury could have found that NFO's security interest in the cheese inventory had value, constituting the money or property element of the offense).

The Government argues that the selective editing of Green's post-trial declaration by Defendant Grisel in his brief should be ignored and that the complete

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[3] As this court has explained, both mail and wire fraud crimes require a "scheme or artifice to defraud." 18 U.S.C. §§ 1341, 1343. "[T]he words 'to defraud' commonly refer 'to wrongdoing one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" *McNally v. United States*, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). *See Mikell*, 163 F. Supp. 2d at 741.

statement is consistent with Green's trial testimony. The Government argues that Green's testimony shows that he was understandably interested in recouping the entire $1,000,000.00 balance and that Green did not indicate that NFO accepted the $186,000 in full final payment before contacting the authorities. (Gov.'s Resp. at 8.)

Defendants Cannot Establish Materiality and Likelihood of Acquittal

Both instances of alleged "newly discovered" evidence of perjury satisfy the first two prongs of the court's Rule 33 analysis. The evidence of the 1999 civil litigation which Purtell failed to disclose during his testimony was not discovered until after the trial had concluded. In addition, the uncontroverted evidence that Purtell sought and obtained an *ex parte* extension of the summons in the 1999 state court action shows that Defendants would not have likely discovered this evidence, even when exercising reasonable diligence. Likewise, Green's post-trial victim impact affidavit was not created until after the trial and there is no indication that Defendants would have discovered that he did advise NFO about the cheese (as gleaned from the fact that he conducted an approximately 40 hour investigation) with reasonable diligence. Nevertheless, Defendant Grisel's motion will be denied because he has not carried his burden to show that the new evidence is material and not merely impeaching or, more importantly, that the introduction of the new evidence would likely produce an acquittal if the case was retried.

During oral argument, Grisel's counsel, when pressed by the court on the third and fourth prongs of

a Rule 33 "newly discovered evidence" analysis, argued that the evidence showing Green's inconsistent testimony was material because it would show the jury that NFO had knowledge of all the material facts when it cashed the $186,000.00, the event that extinguished the security interest under Article 9 of the Uniform Commercial Code.

Defendant Grisel does not challenge the sufficiency of the evidence regarding the sale of the cheese to Nor-Tech at a mere $ 0.25 per pound, a price well below market value, or the companion agreement that required Hines to quickly resell the cheese back to Defendant Grisel's company Innoquest for $.30 per pound. Nor does he challenge the sufficiency of the evidence showing that Innoquest then resold the cheese to Sorrento and Defendants' company, RPC, requiring RPC to pay NFO only $0.25 per pound. Rather, Defendants argue that none of these actions or transactions involving Defendants deprived NFO of its interest in the cheese and it was NFO's own decision to cash the check that caused the loss. Defendants maintain that a jury presented with Green's inconsistent testimony would infer that Green did advise NFO about the $186,000.00 after he was made aware of the "stunning news" that NFO would receive well below the expected $1,000,000 for the cheese. Defendants argue that this new evidence showing that Green advised NFO requires an acquittal on the wire fraud charges because Defendants' actions did not deprive NFO of its interests in the cheese inventory.

Defendant Grisel's argument, however, suffers from a fundamental flaw: it presumes that an actual loss of the security interest caused by Defendants' actions was required for a conviction under 18 U.S.C. § 1343.

It is not. *United States v. Daniel*, 329 F.3d 480, 486 (6th Cir. 2003) (a misrepresentation may be material without actual reliance by the intended victim).

Section 1343 provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned . . . .

18 U.S.C. § 1343.

To convict a defendant of wire fraud, the government must prove the following elements: "(1) a scheme or artifice to defraud; (2) use of interstate wire communications in furtherance of the scheme; and (3) intent to deprive a victim of money or property." *United States v. Prince*, 214 F.3d 740, 747-48 (6th Cir. 2000) (footnote omitted). Wire fraud under § 1343 is a specific intent crime, requiring the government to show:

> not only that a defendant must knowingly make a material misrepresentation or knowingly omit a material fact, but also that the misrepresentation or omission must have the purpose of inducing the victim of the fraud to part with the property or undertake some action

> that he would not otherwise do absent the misrepresentation or omission.

United States v. DeSantis, 134 F.3d 760, 764 (6th Cir. 1988).

A defendant's intent to defraud, his actions constituting a scheme or artifice to defraud, and his use of interstate wire communications in furtherance of the scheme are separate and distinct from a defendant's success in obtaining or depriving the property interest at issue. Moreover, the Sixth Circuit has specifically held that "reliance is not an element of mail or wire fraud." *United States v. Merklinger*, 16 F.3d 670, 678 (6th Cir. 1994). "[T]he mail and wire fraud statutes do not require proof that the intended victim was actually defrauded; the actual success of a scheme to defraud is not an element of either § 1341 or § 1343." *Id.* A defendant may be convicted under § 1343 if the government establishes the specific intent required and that the action elements of the offense were taken with a purpose to defraud. It need not show that a defendant's actions were successful in obtaining the money or property element. *See id.*

The Sixth Circuit recently reiterated this position in *United States v. Daniel,* relying on the Supreme Court's holding in *Neder v. United States*, 527 U.S. 1, 25 (1999). The Sixth Circuit explained:

> The Supreme Court's more recent decision in *Neder, supra,* makes it even clearer that actual reliance is not required for mail or wire fraud. In *Neder* the Court held that the mail and wire fraud statutes incorporated the common-law requirement of materiality. 527 U.S. at 20-25,

119 S.Ct. In doing so, the Court explicitly rejected the argument that a materiality requirement included a reliance requirement:

> the Government is correct that the fraud statutes did not incorporate *all* the elements of common-law fraud. The common-law requirements of "justifiable reliance" and "damages," for example, plainly have no place in the federal fraud statutes. By prohibiting the "scheme to defraud," rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted. But while the language of the fraud statutes is incompatible with these requirements, the Government has failed to show that this language is inconsistent with a materiality requirement.

527 U.S. at 24-25, 119 S.Ct. 1827 (citations omitted) (emphasis in original). Actual reliance is thus "plainly" not required in order for the government to establish that a misrepresentation was material.

Daniel, 329 F.3d at 486-87.

Even when the court assumes that a reasonable jury would infer that NFO's attorney, Mr. Green, was aware of the $186,000.00 check (representing only $0.25 per pound for the sale of the cheese) and that he advised NFO on whether to cash that check, this evidence does not undercut the significant amount of evidence introduced on Defendants' specific intent and

their actions and transactions that showed a scheme to defraud and the materiality of those actions. (*See, e.g.*, Gov't's Resp. at 16 & Exs. D, E, and F.) The newly discovered evidence does not detract from the evidence supporting the jury's conclusion that all of the elements of § 1343 were satisfied. Because this new evidence goes chiefly to whether *NFO* actually relied Defendant's actions in giving up their security interest (i.e. whether Defendants' fraudulent actions were successful), something not required to establish the elements of the offense, the court will deny Defendant Grisel's motion based on Green's alleged perjury.[4]

Defendants also argue that Purtell's failure to disclose a pending civil action between NFO and Defendants materially inhibited their defense and its presentation to a new jury would likely result in an acquittal. Defendants argue that Purtell's improper failure to disclose the civil action that he filed merely eight weeks prior to his testimony, denied them an opportunity to further emphasize their theory that NFO enlisted the help and pressure of the government to prosecute Defendants in order to obtain an advantage in what was otherwise a civil dispute

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[4] In Count 1 of the second superseding indictment, Defendants were charged with conspiracy in violation of 18 U.S.C. § 1956(h). They were convicted on this count for conspiring to violate § 1956(a)(1)(B)(i) by knowing that the property involved in a financial transaction represented the proceeds of some form of unlawful activity and conspiring to, conducting, and attempting to conduct certain financial transactions that involved the proceeds of their unlawful activity by committing mail and wire fraud. Because the wire fraud convictions did not require actual success in defrauding NFO, the conspiracy count requiring unlawful activity is likewise not undermined by the alleged new evidence of perjury.

between private parties. Defendants also argue that Purtell's refusal to disclose the pending civil action during his trial testimony denied the jury an opportunity to consider this evidence as motive for covering up NFO's knowledge of the material facts when it determined to cash the $186,000.00 check and extinguish its security interest in the cheese inventory.

Although the evidence relating to Purtell more strongly suggests perjury (or incorrect testimony at a minimum) than does Green's post-trial victim impact statement, the materiality prong of Defendant's Rule 33 argument is weaker. As discussed above, whether NFO was actually duped into giving up their security interest is not sufficient to undercut the evidence supporting the wire fraud convictions. Purtell's omission did prevent Defendants from *strengthening* their argument that NFO was unfairly seeking government intervention; however, whether NFO reported information to the United States for private economic purposes does not impact whether the jury had sufficient evidence to convict Defendants of the charged offenses. As the court explained during oral argument, this defense theory may be compared to a subtle form of "jury nullification." The court is not convinced that the additional new evidence showing Purtell's incorrect testimony or perjury would likely produce an acquittal during a new trial.

B. Ineffective Assistance of Counsel

The court will also deny Defendant Grisel's motion for a new trial based on his allegations of ineffective assistance of counsel during trial. The court notes that Defendant Mikell did not join this part of Defendant Grisel's motion.

Defendant Grisel argues that he is entitled to a new trial because: (1) his trial counsel was ineffective in cross-examination of Richard Green; (2) his trial counsel failed to call sur-rebuttal witnesses to expose Green's perjury; (3) his trial counsel was ineffective in cross-examination of witness Michael Hines; and (4) his trial counsel was ineffective in his direct examination of witnesses.

The first prong of the analysis of Rule 33 motion for a new trial based on newly discovered evidence requires that the defendant show that the evidence relied on was not known by the defendant at the time of trial. *United States v. D.G. Seago*, 930 F.2d 482, 488 (6th Cir. 1991). A majority of the circuit courts of appeals, including the Sixth Circuit, have take the view that "an ineffective assistance of counsel claim cannot be considered newly discovered evidence for the purpose of a motion for new trial because the facts that give rise to the claim are necessarily known to the defendant at the time of the trial." *Id.* "[E]vidence of ineffective assistance of counsel is not newly discovered evidence for purposes of a motion for new trial where the facts supporting the claim were within the defendant's knowledge at the time of trial." *Id.* at 489; *see also United States v. Wade*, No. 03-3974, 93 Fed.Appx. 789, 790, 2004 WL 603914 (6th Cir. Mar. 23, 2004).

Here, the court need not consider Defendant's ineffective assistance claims under Rule 33 because the facts giving rise to Grisel's allegations were known at the time of trial. The "tactical" deficiencies in trial counsel's performance cited by Defendant Grisel do not constitute newly discovered evidence for purposes of

his motion for a new trial. *See D.G. Seago*, 930 F.2d at 489.

Because the court is not convinced that the newly discovered evidence identified by Defendants would likely produce an acquittal if this case were retried, and that Defendant Grisel's ineffective assistance claims do not present "newly discovered" evidence under Rule 33, the court declines to grant Defendant Grisel's motion for a new trial.

II. DEFENDANT MIKELL'S MOTION FOR RECONSIDERATION

As explained above, Defendant Grisel has also briefed his position regarding the need for an evidentiary hearing on Defendant Mikell's allegation that his co-counsel at trial labored under an actual "self interest" conflict of interest and that this conflict adversely affected the representation in violation of the Sixth Amendment. Defendant Grisel suggests that an evidentiary hearing should be held. For the reasons stated below, and notwithstanding Defendant Mikell's arguments recorded during the February 11, 2005 hearing and in prior briefing, the court will conduct such a hearing.

Defendant Mikell, in a complete turn-around on the issue of an evidentiary hearing (*see* 11/18/04 Order at 4), now argues that, under governing law, no evidentiary hearing should be held and the court's failure to inquire about the alleged conflict with Mr. Harris once raised during trial mandates reversal as a matter of law. *See Moss v. United States*, 323 F.3d 445, 455 (6th Cir. 2003) (citing *Holloway v. Arkansas* and stating: "Indeed, where the defendant or his

counsel objects to the conflict prior to, or during trial, the trial court must inquire as to the extent of the conflict or subject any subsequent conviction to automatic reversal."); *cf Mickens v. Taylor*, 535 U.S. 162, 168 (2002) (*Holloway* [*v. Arkansas*, 435 U.S. 475 (1978)] creates an automatic reversal rule *only* where defense counsel *is forced to represent codefendants over his timely objection*, unless the trial court has determined that there is no conflict.") (emphasis added).

The court is not convinced that Defendant Mikell is automatically entitled to a new trial in this case based on the court's failure to consider or probe the alleged conflict of interest in 1999, and it will order an evidentiary hearing. This is not a case where the court *forced* counsel with an alleged conflict to continue representing a party. *See Mickens* 535 U.S. at168 (*Holloway* [*v. Arkansas*, 435 U.S. 475 (1978)] creates an automatic reversal rule *only* where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict."). In this case, the court *permitted* the withdraw of the attorney allegedly conflicted once this issue was presented to the court and did not *force* continued representation, making it similar to those cases where courts have neglected a duty to inquiry about a conflict. *See id.* at n. 3; *Wood v. Georgia*, 450 U.S. 261 (1981) (remanding for lower court inquiry).

Defendant Mikell argues that the court's failure to conduct an inquiry into the potential self-interest conflict of his co-counsel at trial, triggers the automatic reversal rule presuming prejudice. In essence, Mikell points to the court's failure to inquire as the reason to presume prejudice. As the Sixth

Circuit has explained, however, in *Mickens*, the Supreme Court "rejected the approach of several circuits which determined that a trial court's failure to inquire into a conflict of interest compels automatic reversal of the conviction." *Moss*, 323 F.3d at 471. The Court "held that the trial court's failure to inquire into a potential conflict of interest on the part of the defendant's attorney, about which *the court knew* or reasonably should have known, does not automatically require reversal of the conviction." *Id.* (emphasis added). The *Mickens* Court explained:

> [A] proposed rule of automatic reversal when there existed a conflict that did not affect counsel's performance, but the trial judge failed to make the *Sullivan* mandated inquiry, makes little policy sense . . . . The trial court's awareness of a potential conflict neither renders it more likely that counsel's performance was significantly affected nor in any way renders the verdict unreliable. Nor does the trial judge's failure to make the *Sullivan* mandated inquiry often make it harder for reviewing courts to determine conflict and effect, particularly since those courts may rely on evidence and testimony whose importance only becomes established at trial.

Mickens, 535 U.S. at 172-73. As Supreme Court Justice Anthony Kennedy noted in his concurring opinion, "[t]he constitutional question must turn on whether trial counsel had a conflict of interest that hampered the representation, *not* on whether the trial judge should have been more assiduous in taking prophylactic measures." *Id.* at 179 (Kennedy, J., Concurring) (emphasis added). Inquiring about the

conflict at this stage of the proceedings will avoid any such neglect by the court and will afford Defendants an opportunity to establish whether an actual conflict existed and whether it adversely impacted their trial.

Conducting an evidentiary hearing regarding the alleged conflict at this stage cuts against Mikell's argument that the court failed to inquire about an actual conflict. While the court did not originally pass on the motions for mistrial based on this alleged conflict in 1999, it granted Defendants' motions for acquittal, thus, in the court's prior view, obviating the need to do so. Had the court denied Defendants' motions for acquittal, the court could have examined the pending motions for mistrial and, under existing law, conducted an inquiry into the alleged conflict and its impact on the representation of Defendant Mikell. Accordingly, the court will grant in part Defendant Mikell's motion for reconsideration. The motion is granted inasmuch as the court will hold an evidentiary hearing and render a determination of whether to vacate its November 18, 2004 "Order Denying Defendants' Motion for New Trial."

III. CONCLUSION

IT IS ORDERED that Defendant Grisel's motion for a new trial based on newly discovered evidence of perjury and ineffective assistance of counsel [Dkt. # 401] is DENIED.

IT IS FURTHER ORDERED that Defendant Mikell's "Motion for Reconsideration of Order Denying Mikell's Motions for New Trial" [Dkt. # 391] is GRANTED IN PART.

The court will conduct an evidentiary hearing on the alleged conflict of interest on **August 17, 2005 at 10:00 am.**

S/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: July 12, 2005

[certificate of mailing omitted]

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 97-CR-81493-BC

[Filed November 18, 2004]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
ALAN MIKELL and CHRISTOPHER GRISEL,	)
	)
Defendants.	)
	)

ORDER DENYING DEFENDANTS' MOTIONS FOR NEW TRIAL

This criminal case is before the court on remand to consider Defendants' two previously unconsidered motions asking the court to order a new trial based on asserted irregularities during the trial conducted in the spring of 1999. *United States v. Mikell*, 84 Fed.Appx 485, 2003 WL 22976438 (6th Cir. Dec. 1, 2003). The court has reviewed the parties' supplemental briefing, the original motions and briefing, and conducted a hearing on Defendants'

motions for a new trial on October 20 and 21, 2004. For the reasons set forth below, the court will deny Defendants' motions for a new trial.

I. BACKGROUND

The factual and procedural background leading to the current posture of this case is complex. Much of it has been set forth in this court's published opinion granting Defendants' motions to acquit after a jury verdict for improper venue and for insufficient evidence, and in the Sixth Circuit's decision reversing the court's judgment of acquittal as to counts 1 through 5 and 7 of the fifty-two count Second Superseding Indictment (returned by the grand jury on May 27, 1998). *See United States v. Mikell*, 163 F. Supp. 2d 720 (E.D. Mich. 2001); *Mikell*, 84 Fed.Appx. at 486.

Defendants Mikell and Grisel were the owners of Real Pinconning Cheese ("RPC") in Pinconning, Michigan. On September 26, 1995, RPC entered into an agreement to purchase milk from National Farmers Organization Dairy Custodial Account ("NFO"). Because RPC already owed NFO approximately $1,000,000 for previously shipped milk, NFO agreed to ship additional milk only under certain conditions: namely, a collateral pledge and security agreement whereby RPC could be held in default for failure to remain current on milk payments and whereby NFO could obtain a security interest in RPC's cheese inventory.

By January 1996, RPC owed NFO approximately $2,400,000 (including the previous $1,000,000 debt) for unpaid milk invoices. NFO then notified Defendants

that it was holding RPC in default and exercising control of the collateral, that is, approximately 771,338 pounds of cheese which was then warehoused at, and/or in transit to, Pinconning.

After receiving formal notification that they were being held in default, Defendants devised a scheme whereby they could avoid their obligations to NFO without themselves suffering financially. First, Defendants sold the cheese to Nor-Tech Dairy Advisors, Inc. ("Nor-Tech"), which was located in South Dakota and owned by Ronald Hines. Although the Pinconning cheese was almost entirely grade "A," and at the time worth approximately $1.35 to $1.40 per pound, Defendants sold the cheese to Nor-Tech at a mere $0.25 per pound. A companion agreement required Hines to quickly resell the cheese back to Defendant Grisel's company, Innoquest, for $0.30 per pound plus shipping costs. Grisel, through Innoquest, then resold the cheese to a company called Sorrento at $1.40 per pound and a second entity named E.J. Marketing for an average of $1.36 per pound. RPC was only required to pay NFO the money from the initial sale of cheese to Nor-Tech, which was priced at $0.25 per pound and not at the then prevailing market value.

In an effort to conceal the transaction between Hines and Innoquest, Defendant Grisel directed Sorrento and E.J. Marketing to send the majority of payments for the cheese to Nor-Tech, rather than to Innoquest directly. Hines then forwarded this money to Innoquest, who disbursed some of the money to Defendant Mikell and others. Defendants withheld the details of their below market sales to Nor-Tech and

resale to Innoquest from NFO, enabling them to divert more than $700,000.00 from their secured creditor.

As a result of Defendants' actions, a grand jury charged Mikell and Grisel in a fifty-two count Second Superceding Indictment with, *inter alia,* mail fraud, wire fraud, money laundering, and conspiracy. The criminal conduct chiefly at issue concerns Mikell and Grisel's self-dealing to defraud secured creditor NFO by diverting the value of the cheese inventory from NFO in the closing days of Defendants' cheese business. After a lengthy trial, the jury returned guilty verdicts against Defendants on numerous counts.

Subsequently, this court granted Defendants' motions for acquittal under Federal Rule of Criminal Procedure 29. *Mikell,* 163 F. Supp. 2d at 743. The court ruled that the Government failed to prove that the object of Defendants' scheme was money or property with value and that the government failed to establish venue regarding some of the verdicts. The United States appealed only the court's decision as it related to dismissal of counts based on insufficient evidence, not the venue rulings. On December 1, 2003, the Sixth Circuit reversed this court's order granting the Rule 29 motions for acquittal based on insufficient evidence and remanded the case for the court to consider "Defendants' two unconsidered motions ask[ing] the district court to order a new trial . . . ." *Mikell*, 84 Fed.Appx. at 489.

After the United States Supreme Court denied a petition for a writ of certiorari and after the mandates had issued, the court conducted an in-person status conference with counsel for the Government and Defendants. The parties requested, and the court

agreed, that, given the length of the appeal, they should be entitled to file supplemental briefs on the still pending motions for a new trial. Defendant Mikell filed his 'Brief on Remand In Support of Motion for New Trial" on August 23, 2004 and Defendant Grisel filed a "Notice of Joinder" concurring in Mikell's August 23 brief on September 1, 2004. The Government filed a response on September 14, 2004 and Defendant Mikell filed a reply brief on September 29, 2004. The court conducted a hearing on the motions on October 20 and October 21, 2004.

During the hearing, the court inquired as to whether the parties desired an evidentiary hearing and both sides indicated that they did not. The Government argued that an evidentiary hearing would exceed the limited mandate from the Court of Appeals to decide the new trial motions on the record as established when they were originally filed. Defendants stated that they would be open to an evidentiary hearing if the court deemed one necessary, but that one was not required to decide the motions for a new trial. Accordingly, the court will decide the motions on the record established and based on the original and supplemental briefing. *See United States v. Colon-Munoz*, 318 F.3d 348, 358 (1st Cir. 2003) ("A request for an evidentiary hearing is at the discretion of the trial court."); *Abdur'Rahman v. Bell*, 226 F.3d 696, 704 (6th Cir. 2000) (recognizing that in a habeas case "the district court properly ordered an evidentiary hearing pursuant to its inherent discretionary authority").

II. DEFENDANTS' MOTIONS FOR A NEW TRIAL

Defendant Mikell argues that the court should grant him a new trial because he was denied effective assistance of counsel as a result of his co-counsel Mr. Steven Harris's conflict of interest as an unindicted co-conspirator.[1] Mikell also argues that the prosecution engaged in misconduct by alleging that his co-counsel was an unindicted co-conspirator involved in the same criminal conduct for which Mikell was on trial, causing Mr. Harris to withdraw from the case close to the closing of the Government's case-in-chief. Defendant Grisel's motion for a new trial is based on the same arguments presented by Mikell and on a theory that Harris's conflict of interest and ineffective assistance caused an unfair prejudicial spillover effect denying Grisel a fair trial.

The Government contends that Defendants cannot use allegations of Harris's actual conflict of interest as a basis for a new trial because Defendants were in a position to know whether and to what extent that Harris may have been involved in the criminal conduct at issue. The Government argues that Defendants should not benefit from efforts to salt the record and that Harris withdrew after the Government represented to the court that Harris was an unindicted co-conspirator, thus ending any conflict of interest. In sum, the Government claims that no actual conflict of

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[1] Defendant Mikell was represented by Mr. Harold Gurewitz and Harris during the original trial, while Defendant Grisel was represented by Mr. David B. Herrington. Mr. James Brunson represented the United States.

interest existed, that Defendants have not identified specific instances where Defendant Mikell's representation was impaired by this alleged conflict because Harris and Mikell's interests were aligned, and that it did not engage in misconduct.

A. Harris's Successive Representation Conflicts & His Withdrawal

During a pre-trial hearing on February 16, 1999, the court was made aware of the Government's concern about Harris's role as defense counsel based on potential or actual conflicts of interest that might arise between Harris and Defendant Mikell. Of particular concern was Harris's prior representation of both Mikell and Grisel in civil litigation involving NFO, RPC, and the Snake River Cheese plant. The potential conflict issues were also predicated on the fact that Defendant Mikell might raise an advice of counsel defense, (02/16/99 Conf. Tr. at 3-4, 6-7, 16; 02/22/99 Tr. at 23-26 (Gov. Exs. D-1 & D-2).)

On February 22, 1009, Mr. Gurewitz represented that he had explained the nature of the potential conflicts of interests to Defendant Mikell after he had "discussed [them] with Both Mr. Harris and Mr. Mikell." Defendant Mikell then stated on the record that he wished to waive any potential successive conflict of interest. The court accepted his waiver after questioning him. (02/22/99 Tr. at 23-26.) Mr. Gurewitz also stated that "there [would] not be any advice of counsel defense raised in connection with this proceeding that involves, relates to or arises out of [Mikell's] prior relationship of Mr. Steven Harris." *(Id.* at 26-27.) Defendant Mikell also stated that he understood the implications of foregoing an advice of

counsel defense. As such, the court permitted Harris to continue as co-counsel in the case.

The Government, however, also expressed concern during the February 16, 1999 conference, that the duality of Mr. Harris's representation of both Defendants in the prior related civil matter included a representation that "directly touche[d] on five or six of the counts in this Indictment related to the Hacker set of charges." (02/16/99 Conf. Tr. at 17.) Nevertheless, Defendants did not seek to waive any conflicts that might arise based on the overlap of the prior representation with the "matter that directly touche[d] on five or six of the counts in [the] Indictment." Defense counsel also failed to disclose that Mr. Harris had also represented several of the Government's witnesses including Paul Wadzinski, Joseph Grisel, and Robert Rosene, all of whom were listed on the Government's pre-trial witness list. During the trial proceedings, the court specifically admonished Mr. Gurewitz and Mr. Harris for not disclosing Harris's previous representation of witnesses (03/17/99 Tr. at 30), but denied the Government's March 17, 1999 request seeking Harris's recusal. Any conflicts based on Harris's successive representation were waived by Defendant Mikell.

After learning through the presentation of evidence (discussed in more detail below) and the Government's eventual statement that it believed Harris to be an unindicted co-conspirator, the court permitted him to withdraw on April 14, 1999, near the end of the Government's case-in-chief.

Defendants' motions for a new trial based on ineffective assistance of counsel are not based on the

conflicts associated with Harris's successive representation. Rather, Defendants argue that the actual conflict at issue was a "self interest" conflict based on Harris's involvement in the very allegations of criminal conduct that he was defending his client against. The court did not specifically address this type of conflict in its earlier conflict consideration. (04/12/99 Tr. at 13; Gov.'s Resp. on Remand Ex. E-1.) Defendants argue this type of "self interest" conflict, pitting Harris's interests to avoid criminal liability against his client's interests, was not waived by Mikell and, by its nature, is incapable of being waived. *See United States v. Jones*, 381 F.3d 114, 119 (2d Cir. 2004). It is this self interest conflict that serves as the basis for the alleged ineffective assistance claims and Defendants cite to several instances where they argue that the evidence implicitly revealed that Harris was considered an unindicted co-conspirator.

B. Richard Green's Testimony

First, Defendants cite the trial testimony of Richard Green, corporate counsel for NFO. Defendants argue that the March 5, 1999 testimony given by Mr. Green, relating to his presence at a deposition taken in the earlier civil litigation between NFO and RPC, implied that Mr. Harris kept his co-counsel in that civil case (Mr. Opperman) "in the dark" about Grisel's purchase of the cheese back by Innoquest, Defendant Grisel's company. The Government's theory was that Defendants defrauded NFO by selling the RPC cheese to Innoquest and keeping this under market value sale secret from NFO.

On March 5, 1999, Harris cross-examined Richard Green. During one of Green's answers he stated that

one of RPC's lawyers who was present at the civil deposition of Mr. Hines, Mr. Opperman, was shocked when he learned that the cheese had been sold back to Grisel. Mr. Green was a lawyer in the civil case for NFO who deposed Mr. Hines. His testimony in Defendants' trial related to his observations of Mr. Opperman (co-counsel for RPC along with Mr. Harris) during the Hines deposition.

On redirect examination, counsel for the Government asked: "How do you remember the way in which Mr. Opperman registered his surprise?" (03/05/99 Tr. at 85; Def.'s Ex. A.) Mr. Harris made a hearsay and relevancy objection that the court overruled. (*Id.* at 85-86.) Mr. Harris also stated that the statement involved a matter volunteered by the witness but not inquired into by him on cross. Defendants argue that Green's narrative response to the Government's question included testimony that Opperman interrupted Mr. Green's questioning of Hines to assert his own lack of complicity in the fraud allegedly perpetrated against NFO. Mr. Green also opined that "the only reason that I could infer for [Opperman] [interrupting and] asking those questions was that he was surprised to hear that one of the principals and his client [Grisel] had been the purchaser of the cheese." *(Id.* at 86.) Defendants claim that testimony of Opperman's shock and embarrassment during the Hines deposition emphasized the Government's theory that the cheese sale was fraudulent and that Harris was implicitly involved. The court overruled Defendants' objections to the redirect testimony based on hearsay, opinion evidence, and that such testimony exceeded the scope of cross examination. Defendants further claim that

this testimony unfairly implicated Harris in the criminal conduct of his client Mikell.

C. Joseph Purtell's Testimony

Next, Defendants note that they moved for a mistrial on March 9, 1999, following testimony from Government witness, Joseph Purtell. (3/9/99 Tr. at 1-5.) Defendant Mikell based his motion for mistrial on redirect testimony from Purtell that Steve Harris "was calling the shots in connection with the civil litigation [between NFO and RPC]" and that the filing of a counterclaim by NFO in that prior civil litigation was a "stall tactic." (03/08/09 Tr. at 104-05.) Purtell testified that, according to Opperman, Harris was calling the shots in the civil case for RPC, that Opperman had apologized and professed ignorance regarding the under market value buy back of the cheese by Grisel's company, Innoquest. *(Id.* at 107-08; Def. Mikell's Br. at 9.) Harris objected to the Government's questions of Purtell on redirect based February 17, 2010 on Federal Rules of Evidence 403, 801, and 802. The court overruled these objections and concluded that the testimony was permitted pursuant to Federal Rule of Evidence 801(d)(2)(C) (an admission by a person authorized by the party to make a statement).

The Government argues that the information elicited from Purtell concerning Harris calling the shots was unknown to it until less than one hour before the testimony and that the information was discovered after his direct examination. It claims that Harris's name was injected into the proceedings, but not by the Government, and that the selection of

Harris as co-counsel was done in order to "salt the record" and to establish an "appellate parachute."

D. Special Agent Georgeff's Testimony

Defendants also identify the April 9, 1999 testimony of IRS Special Agent Georgeff as evidence of Harris's conflict of interest and the Government's injection of Harris's involvement in the criminal conduct for which his client was charged. (*See* 04/9/99 Tr. at 131-36.) On April 9, 1999, Special Agent Georgeff testified that during an execution of a search warrant at Innoquest's offices in Fort Worth, Texas, Defendant Grisel asked to make a phone call and that Grisel was afforded the chance to make a private call during the search. (*Id.* at 134.)

After stating that Defendant Grisel was permitted to make a private call, counsel for the Government asked Agent Georgeff if Grisel informed him who he had spoken to on the phone. (*Id.* at 135.) Defense counsel objected based on relevance and the court overruled the objection. The witness then stated that Grisel informed him that he had spoken with Steve Harris. Georgeff also indicated that Grisel did not cooperate with the search after making the phone call.

After the jury was excused, Defendants' counsel made further arguments in support of the objection. Defendants argued that the testimony violated their Fifth Amendment rights. They also stated an objection based on the prosecutor's alleged misconduct in injecting Defendant Mikell's co-counsel, Harris, in a fact role in the case. (*Id.* at 165-66.) The court registered its surprise to Georgeff's answer that attorney Harris was on the other end of the phone call

and questioned why Defendant Grisel's attorney would not have objected, anticipating the answer based on his review of the discovery materials in the case. The court noted, "In thinking that the drift of the question was that [Grisel] was calling some other actor within this – maybe he was calling another actor within this scheme, based upon [Government counsel's] view of the situation – but in any event, it seemed to [the court] to be not irrelevant, happening within the scope of this search execution in the heat of the moment and so forth." *(Id.* at 169.) The court went on to state:

> In retrospect I do have some question, Mr. Brunson, about the relevance of proving up Mr. Harris'[s] identity within the scope of all these things. I'm just – there may be something I'm missing about this, but I'm not entirely sure whether that is relevant or not. It's a separate question as to whether it is relevant; if it's unnecessarily prejudicial under Rule 403 or some sort of sixth amendment advice of right to counsel that's lurking in the shadows here, I frankly doubt that.
>
> I do not think the tenor of the question does what Mr. Gurewitz sort of provisionally implied, suggesting Mr. Grisel was refusing to talk to the agent. Quite to the contrary, he clearly talked to the agent as the agent has testified. It's just that he didn't want to help him look through the file folders, that's the whole input of it.
>
> You do what you have to do, Mr. Grisel said. It seems to me that's fine, that's not an unexpected reaction, in fact, as far as I'm

> concerned. I don't think the jury would be shocked by that either.

(Id. at 169-70.)

The court asked for additional comment on the relevance issue at the start of the following court session, on Monday April 12, 1999. (04/12/99 Tr. at 2.) On April 12, the Government again argued that Agent Georgeff's testimony was relevant to foreclose a defense argument that the IRS Agent executed a search warrant without letting Defendant Mikell make a phone call, and that the government had learned during trial that the evidence showed Mr. Harris to be an unindicted co-conspirator. *(Id.* at 2-3.) The Government also expressed its repeated concerns that Mr. Harris's involvement in this case as co-counsel, given the nature of his relationship with the Defendants and the underlying events leading to the criminal charges, was a tactic by the defense to invite error in the event of a conviction. *(Id.* at 3-5.) Defendants argued that the Government engaged in misconduct because it knew of Harris's involvement prior to trial and intended to inject Harris into the case as an unindicted co-conspirator. *(Id.* at 6, 18-19.) The court ultimately overruled the relevance objection. *(Id.* at 9-14, 19-20.) Harris's position as a potential co-conspirator eventually led the court to permit his voluntary withdrawal.

E. Government Exhibit 532

Next, Defendants cite their objection to the admissibility of Government exhibit 532, a June 4, 1996 letter from Harris to Defendants Mikell and Grisel. (Def. Mikell's Br. on Remand at Ex. J.) This

letter concerns the "Hacker investment/transactions," and Defendants argue that it existence shows that the Government intended, before the trial began, to offer this letter to support its theory that Harris was an unindicted co-conspirator. Defendants claim that they objected to the exhibit prior to trial and that on April 13, 1999, the Government argued that the letter was admissible under the crime/fraud exception to the attorney-client privilege. The court considered the matter outside the presence of the jury on April 13, 1999, and ruled that there was sufficient basis to overcome the privilege.[2]

The Government counters by arguing that Defendants were in the position to know, and knew, of the scope of Harris's involvement in the criminal matters and that Defendants merely raised an untimely foundation objection prior to trial.

F. Government's Closing Argument

Defendants also note that they moved for a mistrial during the Government's closing argument. This motion was based on the what Defendants characterize as "the prosecutor's argument to the jury that Steven Harris played a knowing role in furthering the fraud allegations on which the prosecutor asked the jury to find Defendant Mikell guilty." (Def. Mikell's Br. on Remand at 14.) Defendants argue that the prosecution improperly implicated Harris (defense co-

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[2] Defendants also cite the testimony of Deanna Trimm, Defendant Grisel's sister, where she indicated that she issued a payment from the Innoquest Project account to Mr. Harris in the amount of $30,000.00.

counsel) in the allegations of the NFO fraud and Hacker fraud. The Government argued that Opperman's statements introduced through other witnesses confirmed that Harris "was calling the shots" and that RPC had filed a counterclaim as a stall tactic in the prior civil litigation. Counsel then stated "This makes you wonder, members of the jury, what else Mr. Opperman was kept in the dark about." A comment, Defendants argue, that asked the jury to speculate on the degree of Harris's involvement to further the schemes at issue. Defendants also claim that the Government improperly argued that Harris was Defendants' "bulldog" and that the June 4, 1996 letter showed actions in furtherance of the scheme.

The Government argues that its accurate reference to the RPC counterclaim orchestrated by Harris as a stalling action and its reference to Harris as Grisel's "bulldog," a term used by Grisel during his own testimony, caused no unfair prejudice.

III. STANDARD

Federal Rule of Criminal Procedure 33 governs the pending motions for a new trial. It provides, in relevant part, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interests of justice so requires." Fed. R. Crim. P. 33(a). A decision to grant or deny a motion for a new trial under Rule 33 lies within the discretion of the district court. *See United States v. Lattner*, 385 F.3d 947, 958 (6th Cir. 2004) ("The district court's denial of a motion for new trial is reviewed under an abuse of discretion standard.") (citing *United States v. Galtan-Acevedo*, 148 F.3d 577, 589 (6th Cir. 1998)).

IV. DISCUSSION

A. Ineffective Assistance of Counsel Based on Alleged Conflict of Interest

The Sixth Amendment provides that a criminal defendant shall have the right to "Assistance of Counsel for his defence." U.S. Const. amend. VI. "This right has been accorded, we have said, 'not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" *Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)). "[A]ssistance [of counsel] which is ineffective in preserving fairness does not meet the constitutional mandate." *Id.* However, "it also follows that defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation." *Id.*

As a general rule, to establish ineffective assistance of counsel under the Sixth Amendment, a criminal defendant must show (1) that his counsel's performance was deficient such that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and (2) that counsel's deficient performance prejudiced the criminal defendant by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also United States v. Hall*, 200 F.3d 962, 965 (6th Cir. 2000) ("To analyze ineffective assistance of counsel claims, this Circuit applies the two-pronged standard in *Strickland v. Washington*.").

"Conflict of interest cases involve a slightly different standard than that used in traditional ineffectiveness claims." *Hall*, 200 F.3d at 965. If a conflict of interest is established, "counsel breaches [his] duty of loyalty, perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 692. Therefore, when a criminal defendant establishes the existence of an actual conflict of interest, the prejudice prong of the *Strickland* standard is presumed. *Mickens*, 535 U.S. at 175; *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980); *Hall*, 200 F.3d at 965; *Olden v. United States*, 224 F.3d 561, 565 (6th Cir. 2000).

"Prejudice is presumed, however, '*only if* the defendant demonstrates that counsel 'actively represented conflicting interests' *and* that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Hall*, 200 F.3d at 965 (quoting *Cuyler*, 446 U.S. at 350 and citing *Thomas v. Foltz*, 818 F.2d 476, 482 (6th Cir. 1987) (emphasis added)); *Wynne*, 279 F. Supp. 2d at 886; *Rugiero v. United States*, 330 F. Supp. 2d 900, 906 (E.D. Mich. 2004). A criminal defendant must show that his lawyer's performance was hampered by an actual conflict of interest that may be demonstrated "by pointing to 'specific instances in the record' that indicate that the attorney 'made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other.'" *Riggs v. United States*, 209 F.3d 828, 831-32 (6th Cir. 2000) (quoting *Foltz*, 818 F.2d at 481); *see also Moss v. United States*, 323 F.3d 445, 455 (6th Cir. 2003).

The Sixth Circuit has "historically characterized *Sullivan* as requiring both 'actual conflict' and 'effect on representation' to establish a violation of the Sixth

Amendment." *McFarland v. Yukins*, 358 F.3d 688, 705 (6th Cir. 2004). Although the Supreme Court referred to an "actual conflict" as one that adversely affects counsel's performance, this "change in terminology" does not change the substance of the two prong test applied in the Sixth Circuit. *Id.* Prejudice is also presumed when "counsel is completely denied due to absence at a critical stage of a trial." *Olden*, 224 F.3d at 565.

Conflicts of interest that may arise between an attorney and his criminal defendant client are generally grouped into three categories: (1) concurrent representation (also refereed to as joint, multiple or simultaneous representation) of clients with conflicting interests, (2) successive representation of clients with conflicting interests (i.e. when counsel has previously represented a co-defendant or trial witness), and (3) conflicts that pit the attorney's personal interest against those of the defendant." *Rugiero*, 330 F. Supp. 2d at 905. The court has already determined that Defendant Mikell waived certain successive representation conflicts and this case turns on allegations of Harris's self interest conflict that arose when he was implicated in the criminal conduct of his client.

Defendants urge this court to adopt the Second Circuit's rule finding a *per se* violation of the Sixth Amendment when (1) defendant's counsel was unlicenced or (2) when "the attorney has engaged in the defendant's crimes." *United States v. Fulton*, 5 F.3d 605, 611 (2d Cir. 1993); *see also United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984). As one panel of the Tenth Circuit Court of Appeals recently noted, "[w]hen applied, the [Second Circuit's] *per se* rule

eliminates the defendant's need to show that the conflict adversely affected the lawyer's performance as required by *Cuyler*." *Mora v. Williams*, 2004 WL 1926218, at *14 n.4 (10th Cir. Aug. 31, 2004).

The court refuses Defendants' invitation to apply the Second Circuit *per se* rule reflected in *Fulton* and *Cancilla* for several reasons. First, *Harris v. Carter*, 337 F.3d 758 (6th Cir. 2003) affirmed the rule in the Sixth Circuit that "[t]his Circuit applies the *Cuyler* analysis to all Sixth Amendment conflict-of-interest claims." *Harris*, 337 F.3d at 762; *Rugiero*, 330 F. Supp. 2d at 906. The Sixth Circuit has not adopted the reasoning in *Felton* and the pronouncement by the *Harris* court counsels this court to apply the *Cuyler* analysis. Moreover, the Sixth Circuit has stated that it "specifically has rejected a *per se* rule as to conflicts and requires proof of an actual conflict." *Taylor v. United States*, 985 F.2d 844, 846 (6th Cir. 1993).

Second, the viability of the Second Circuit's *per se* rule is suspect in light of the Supreme Court's decision in *Mickens*. Under *Mickens*, even if a criminal defendant shows his lawyer had divergent interests from his own, that defendant must also "establish that the conflict of interest adversely affected his counsel's performance." *Mickens*, 535 U.S. at 174. "Until . . . a defendant shows that his counsel *actively represented* conflicting interest, he has not established the constitutional predicate for his claim of ineffective assistance." *Id.* at 175; *Mora v. Williams*, 2004 WL 1926218, at *8. The court agrees that a defendant must show *active* representation of conflicting interest by the lawyer and not merely potential adverse impacts on representation.

Third, other courts in this district have applied the *Cuyler* analysis to so-called "self interest" conflicts. In *Rugiero*, the court granted a writ of habeas corpus after concluding that a criminal defendant's lawyer labored under a "self interest" actual conflict of interest and after finding four specific instances where that actual conflict adversely affected the representation. *See Rugiero*, 330 F. Supp. 2d at 906-09. Also, in *Wynne v. Renico*, the court denied a writ of habeas corpus to a petitioner who argued that his attorney had a self interest conflict based on allegations that the attorney tampered with evidence. *Wynne*, 279 F. Supp. 2d at 886. The *Wynne* court ruled that no actual conflict existed and that there was no indication that threats of potential criminal prosecution for evidence tampering "dampened the vigor of [the lawyer's] advocacy for the petitioner"--i.e. there was no adverse effect on representation. *Id.*

Fourth, other Circuits have rejected the Second Circuit's *per se* rule finding an automatic violation of the Sixth Amendment when an attorney has engaged in the defendant's crimes. *See Mora v. Williams*, 2004 WL 1926218, at *14 n.4 (10th Cir.); *United States v. Wallace*, 276 F.3d 360, 368 (7th Cir. 2002) (noting that the Seventh Circuit has rejected the *Fulton* and *Cancilla* rule from the Second Circuit); *United States v. Scarfo*, 980 F. Supp. 803, 806 (E.D. Pa. 1997) ("the Third Circuit has followed and continues to follow the standard enunciated by the Supreme Court in *Cuyler*. . . Fulton's per se rule is not constitutionally mandated, is contrary to Supreme Court precedent, and is not now and has never been the law of the Third Circuit"). The court now turns to the *Cuyler* analysis.

1. Actual Conflict

Defendants argue that an actual self interest conflict of interest arose between Defendant Mikell and Harris based on the evidence introduced and the Government's position that Harris was an unindicted co-conspirator in the underlying fraudulent schemes identified in the indictment. Conversely, the Government argues that no actual conflict of interest arose because: (1) It did not learn of Harris's unindicted co-conspirator status until the evidence unfolded during the trial and Harris withdrew once this conflict was identified; and (2) that no actual conflict of interest arose because Defendants were in the best position to know the full extent (if any) of Harris's involvement in the underlying conduct related to the criminal charges. Therefore, any error or conflict was invited by Defendants and their counsel's own decisions.

The court disagrees with the Government's first position that no actual conflict of interest existed because Harris withdrew near the end of the Government's proofs. If Harris in fact labored under a conflict that pitted his interests in avoiding prosecution against his client's interests, the conflict would exist throughout the representation. It is not avoided simply because it was revealed and the attorney withdrew. Harris's withdrawal prevented further potential conflicts, but speaks nothing of whether Harris's earlier representation was conducted under an actual conflict or whether the conflict adversely affected his performance.

Although the record evidence suggests that Harris was an unindicted co-conspirator, the court does not

automatically presume that an actual of conflict of interest existed because it must determine whether Defendants invited this error or conflict. The Government raised issues regarding Harris's potential conflicts associated with successive representation before trial and sought the disqualification of Harris, but not on a theory that Harris had a self-interest conflict.

Based on these affirmative actions taken by the Government, it is easy for the court to conclude that, had the Government known the full extent of Harris's involvement in the underlying fraudulent schemes, it would have sought his disqualification on this additional basis. The record before the court is insufficient to support a conclusion that the Government "sandbagged" or withheld this fact until the trial was well underway. In fact, the weight of the evidence shows that Harris and Defendant Mikell were in the best position to know the extent of Harris's involvement in the underlying criminal conduct, and that Harris's involvement as co-counsel may, indeed, have been (as the Government argues) an attempt to inject into the record an issue that might provide an appellate escape route in the event of a conviction.

The court finds the reasoning adopted by the Seventh Circuit Court of Appeals in *Cerro v. United States*, 872 F.2d 780 (7th Cir. 1989) persuasive in this case. Although factually distinguishable from the case at hand, the *Cerro* court addressed whether a criminal defendant could argue that he was denied his Sixth Amendment right to effective assistance of counsel when he was in position to be aware that his attorney was involved in the same or similar criminal activity.

In *Cerro,* the Seventh Circuit reviewed Cerro's appeal of the district court's order denying his 28 U.S.C. § 2255 motion to vacate his convictions for conspiracy to distribute cocaine and for filing false income tax returns. *Cerro*, 872 F.2d at 782. Cerro argued that he was denied effective assistance of counsel because his attorney labored under an actual conflict that affected his representation of Cerro, including his lawyer's self interest in avoiding prosecution. *Id.* Grand jury testimony had revealed that one witness identified Cerro's lawyer and testified that the lawyer had entered a massage parlor with a paper bag over his head and purchased cocaine. *Id.* at 783. After reviewing the evidence, the Seventh Circuit ruled that there was no evidence of an actual conflict because the evidence "did not clearly establish" Cerro's lawyer's involvement in criminal activity. *Id.* at 785. The court also noted that, unlike this case, the government did not conclude that the lawyer had engaged in criminal activity. Notwithstanding this conclusion, the Seventh Circuit went on to state that it would reject Cerro's claim *even if his lawyer was involved in criminal activity* because Cerro was clearly aware of the potential conflict. The court stated:

> In addition, if Ewers [the lawyer with an alleged actual conflict] was involved in criminal activity, Cerro probably knew about it. If we accept the underlying premise of Cerro's argument, we must find that [his lawyer] was actively involved in the same criminal conspiracy that Cerro headed according to the overwhelming testimony of Cerro's coconspirators. If this was the case, Cerro was clearly aware of the potential conflict well in advance of trial. Cerro's argument at this point

> is disingenuous and incongruous. He wants us to overturn his conviction because his attorney had previously been deeply involved in helping him run his criminal conspiracy. We do not accept his argument.

Id. at 785-86; *see also Wallace*, 276 F.3d at 368.

Here, Defendants Mikell and Grisel were in the position to be clearly aware of any active involvement by Harris in the underlying transactions that were alleged to be criminal in nature. Like the defendant in *Cerro,* Defendants want this court to grant them a new trial because Mikell's lawyer, whom he selected as co-counsel, may have been involved in assisting Defendants in their criminal conspiracy. The court will not grant Defendant's motion for a new trial on this basis.[3]

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[3] This case does not present the classic case of invited error as that doctrine is described in this circuit because Defendants did not actively induce the court to make an affirmative ruling on the precise issue of an actual self-interest conflict. However, Defendants' silence in the face of their position and knowledge about any criminal involvement of Harris prevented the court from avoiding what has now been revealed as a potential pitfall. The invited error doctrine's rationale, however, clearly supports the court's conclusion that Defendants cannot benefit from Mikell's choice of counsel when Mikell and Harris were in the best position to know of any criminal involvement by Harris and consequentially whether an actual or potential conflict of interest existed.

The invited error doctrine prohibits a party from challenging, on appeal, errors that he invited or provoked the court or opposing party to commit. *See United States v. Sharpe*, 996 F.2d 125, 129 (6th Cir. 1993); *Harvis v. Roadway Express, Inc.*, 923 F.2d 50, 60-

2. Adverse Impact on Representation

Even if Harris labored under an actual conflict of interest, Defendants have failed to identify specific instances where Harris's representation as co-counsel adversely affected Defendant Mikell's representation. In order to show that his lawyer's performance was hampered by an actual conflict, a criminal defendant may do so "by pointing to 'specific instances in the record' that indicate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to [one interest] but harmful to the other." *Wynne*, 279 F. Supp. 2d at 886 (citing *Riggs*, 209 F.3d at 831-32). "If [an attorney] did not make such a choice, the conflict remained hypothetical." *Foltz*, 818 F.2d at 481; *cf Rugiero*, 330 F. Supp. 2d at 907 (finding four specific instances in the record where counsel's performance adversely impacted his client's representation).

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61 (6th Cir. 1991). In *Harvis*, the court described "invited error" as follows:

> The doctrine of 'invited error' is a branch of the doctrine of waiver by which courts prevent a party from inducing an erroneous ruling and later seeking to profit from the legal consequences of having the ruling set aside. It is based on reliance interests similar to those that support the doctrines of equitable and promissory estoppel. Having induced the court to rely on a particular erroneous proposition of law or fact, a party in the normal case may not at a later stage of the case use the error to set aside the immediate consequences of the error.

Harvis, 923 F.2d at 61. Here, Defendant Mikell's choice of Mr. Harris as co-counsel induced the potential for a conflict to arise.

The Government argues that "other than a generalized, vague claim that 'Harris's ability to properly represent his client was compromised,' Mikell does not point to a single instance in which his overall representation by the Harris-Gurewitz team was ineffective. He does not allege any breach of loyalty by Harris, or suggest any facts concerning his involvement were unknown to Mikell or Grisel." (Gov.'s Resp. at 13-14 (quoting Def.'s Br. on Remand at 17).) The court agrees that Defendants generally alleged an adverse effect caused by the alleged conflict of Harris, but fail to identify specific instances where Harris's choices (actions or inactions) impaired his advocacy.

Defendants chiefly argue that the injection of Harris as an unindicted co-conspirator directly and by implication during the presentation of evidence impaired Harris's representation. In spite of Defendants' contention, Harris's conflict and self-interest to avoid prosecution provided the incentive for him to avoid, at all costs, injecting himself as a party to the conspiracy. There is no evidence that his alleged conflict caused him to ask questions during cross examination of witnesses that injected his own name as a person with ties to the criminal conduct at issue. Moreover, Harris's interest in securing an acquittal for Mikell and Grisel was aligned with his own interest in avoiding prosecution. The court recognizes the potential for Harris's interests to diverge (e.g. in attempting to secure or not secure a deal based on cooperation with the Government), however, on the record presented, Defendants fail to identify the specific actions, inactions, or choices Harris made that were in conflict with Mikell's interests.

In addition, Defendants fail to explain why any of their alleged adverse effects created by Harris were not cured or curable by Defendant Mikell's representation by Mr. Gurewitz who was unhampered by any allegations of an actual conflict. *See United States v. Novaton*, 271 F.3d 968, 1012 & n. 11 (11th Cir. 2001) ("We note that Cuni had an additional attorney at trial, Mr. Villalobos, who did not suffer from any conflict of interest. The presence of co-counsel unaffected by the alleged conflict of interest makes it even less likely that Cuni's representation was adversely affected by the alleged conflict.").

Defendants argue generally that Harris was responsible for formulating theories and for the cross-examination of several important Government witnesses. (*See, e.g.*, Def. Mikell's Br. on Remand at 17.) The record before this court, does not identify or explain precisely what theories or choices made by Harris adversely affected the representation. Nor does it explain why Mr. Gurewitz's conflict-free representation did not afford Defendant Mikell the ability to further examine witnesses or pursue theories after the implication of Mr. Harris. In addition, there is no evidence that Harris intentionally asked questions during his cross examination of witnesses that led to his own implication in the criminal conduct. As stated above, his self-interest would counsel strongly against this and therefore any prejudice suffered from Harris's implication was not caused by Harris's actions taken during the representation.

Defendants also claim that Harris's ability to further examine witnesses was hindered once he was implicated in the conspiracy. Specifically, they claim Mr. Purtell's testimony that Harris was "calling the

shots" and that the counter-claim in the prior civil action was a stalling tactic could be rebutted only by privileged testimony of Harris. Harris's conduct during his representation of Mikell did not create this impediment. In fact, even if Harris had not been retained by Mikell the communications between Harris and his client during the prior civil action would be subject to protection (limited, of course, by certain exceptions) under the attorney-client privilege. Any impact on the representation existed from Harris's status as a prior attorney and his role in the underlying criminal conduct, not on his actions taken as counsel in this case. Defendants waived any conflicts based on Harris's successive representation of Defendants or witnesses. This argument fails to reveal how a specific adverse choice, action, or inaction by Harris, *during* the representation, was caused by the alleged self-interest conflict.

Defendants rely on *United States v. Rugiero* to support their motion for a new trial. Defendants' reliance is misplaced because the facts in *Rugiero* are distinguishable from the current facts in several important aspects. First, unlike the current case, the petitioner in *Rugiero* did not become aware of his lawyer's self-interest conflict until the jury was deliberating and his awareness did not come from his own knowledge. *Rugiero*, 330 F. Supp. 2d at 904. Rather it was based on local news broadcasts which reported that his lawyer was the subject of a federal criminal investigation. *Id.* This case presents facts regarding Defendant's Mikell's knowledge about his lawyer's involvement closer to those in *Cerro, supra*.

Second, the petitioner in *Rugiero* identified four specific instances (perhaps based on a record

supplemented by § 2255 proceedings) of adverse effect on the representation caused by the lawyer's actual conflict. *Id.* at 907. First, the court ruled that the petitioner's lawyer refused to pursue a plea agreement for his client and that the lawyer's self interest in avoiding criminal liability provided an incentive for the lawyer not to pursue a plea for his client. *Id.* Second, the court identified two times where the lawyer was responsible for delaying the trial and that the long delay harmed the petitioner because the Government was able to strengthen its case against him. *Id.* Third, the court found that the lawyer failed to zealously defend the petitioner's interests by not pressing an issue related to a violation of the district court's sequestration order by a key prosecution witness. *Id.* Finally, the court found evidence that the lawyer manipulated the jury by being present when the jurors were questioned as to whether the juror's awareness of the lawyer's potential criminal activity impaired their ability to fairly perform their duties. *Id.* Although similar issues could potentially have arisen during Defendants' case, they have not been specifically identified with support in the record. They remain hypothetical. There is also a lack of spillover prejudicial effect as the alleged conflict relates to Defendant Grisel. The court will deny Defendants' motion for a new trial based on allegations of ineffective assistance of counsel.

B. Prosecutorial Misconduct

In reviewing claims of prosecutorial misconduct based on improper statements, the court employs a two-part test. *United States v. Galloway,* 316 F.3d 624, 632 (6th Cir. 2003); *United States v. Carroll,* 26 F.3d 1380, 1387 (6th Cir. 1994). First, it must determine

whether the remarks were improper. Second, if the remarks are deemed improper, it must determine whether the remarks were flagrant and warrant reversal. *Galloway*, 316 F.3d at 632.

In determining whether improper remarks are flagrant and warrant reversal, the court examines four factors: (1) whether the statements tended to mislead the jury and prejudice the defendant; (2) whether the statements were isolated or pervasive; (3) whether the statements were deliberately placed before the jury; and (4) whether the evidence against the accused is otherwise strong. *Id.* None of the four factors are determinative, but reversal is not warranted unless the court finds that proof of the defendant's guilt is not overwhelming, the defense objected to the statements, and the trial judge did not cure the impropriety through admonishment to the jury. *Id.*

Defendants, during a sidebar, moved for a mistrial during the Government's closing argument and the court ruled that the Government's statements were fair comment and found no miscarriage of justice. (05/18/99 Tr, at 168-68.) The following excerpt from the transcript on May 18, 1999 is instructive.

> (Jury excused)
>
> **THE COURT:** Mr. Gurewitz, you wanted a few moments here to expand on your comments at the side of [the] bench I believe.
>
> **MR. GUREWITZ:** Yes, thank you, judge. At the side of [the] bench I moved again for mistrial and renewed the prior motion for mistrial I had made earlier in the case relating

to matters concerning Mr. Harris and Mr. Brunson's declaration in the course of this trial [that] he's an unindicted co-conspirator.

The two particular points in testimony that I raised concerned, first, the reference to exhibit 532 which is a letter signed by Mr. Harris in June of 1996 and addressed to Mr. Mikell and Mr. Grisel.

As I indicated before, it's my recollection that at the time the matters were resolved earlier in the case concerning Mr. Harris' status and the motions we had made, there was some discussion about that particular letter. It had been earlier offered, and over objection of attorney-client privilege, Mr. Brunson argued an exception.

The letter was received, its my recollection thereafter plaintiff's inquiry of Mr. Brunson whether or not he intended to use that letter later on in the trial, refer to it [in] any way during the examination or argument to the jury, he said no. In fact, I believe he made a commitment to the court that he would not.

Not just that he simply referred to it, but under the circumstances the defendants really had no opportunity to refute, confront or do anything with that, or call Mr. Harris as a witness.

Not only would there be an attorney-client privilege issue that would come into play, he had been an attorney during the case and he at

that point in time, I think, has fifth amendment privilege.

The second issue relates to a comment that was made concerning Mr. Harris by Mr. Brunson at an earlier point in his argument, shortly after we returned from lunch . . . He referred to Mr. Opperman at that deposition and said that Mr. Opperman had apologized after the revelation by Mr. Hines about Mr. Grisel's involvement in the transaction at that time.

Then he said, Mr. Brunson said, Mr. Opperman had not been told prior to that time by attorney Steven Harris that the cheese had been sold . . . I won't go into the detail of the way I view that and the significance of it, based upon all the evidence in this case that indicates that there is just absolutely no factual basis for that kind of assertion when it came in from the witness. But, nevertheless he said that.

The argument, by Mr. Brunson is nothing more than mere speculation. But it's particularly troublesome because it all but said, not using the word co-conspirator, that Mr. Harris was involved in the criminal activity. That, together with his other comments, I think is substantial prejudice and I find it to be very unfortunate that we get to the end of this lengthy trial, Mr. Brunson now injects these kinds of issues that compound the problem we had before into the record. Those are the reasons for my motion.

(05/18/99 Tr. at 207-10.)

Mr. Herrington joined the motion for Defendant Grisel and the court afforded Mr. Brunson an opportunity to respond in which he stated that he did not believe he limited himself from making fair use of exhibit 532 after offering it into evidence and that he recalled that he represented only that he would not label or refer to Mr. Harris as an unindicted co-conspirator. (*Id.* at 210-11.) Mr. Brunson also stated that one of the Defendants had used the term "Bulldog" to refer to Mr. Harris. (*Id.* at 211.) The court then stated:

> I do not detect any manifest miscarriage of justice here, the only thing that seems to me of concern is by referring to attorney Harris in this sense, I think that at least a step or two toward casting him as an unindicted co-conspirator was taken, but those words were not used and the accusation was oblique, if existent at all. There's been no direct criticism of his participation here, though there was commentary about the way he asked questions and the answers he received from a number of witnesses when he was still in the case.
>
> But I think it's all fair commentary with respect to question and answers and so on, and it's all a matter of record.
>
> The attorneys, the way in which they ask questions, can be commented upon in argument if it's done with at least reasonable accuracy. There's no such problem in this regard.

> So as I ask myself whether there is a significant concern with respect to oblique references to Mr. Harris as perhaps an unindicted co-conspirator, I answer no, there is no[] such concern of the degree that would necessitate a mistrial.
>
> Secondarily, if there is a belief by Mr. Gurewitz that there was some kind of restriction, voluntary or otherwise, on the use of a particular exhibit, I'm going to have to see record support for that. I do not recall it.

(*Id.* at 211-12.)

Defendants have not provided additional argument or support that would change the court's initial ruling during trial that the Government's remarks during closing were fair comment on the evidence. Defendants also fail to cite the record where the Government allegedly limited its ability to comment on the evidence introduced and the oblique references to Mr. Harris did not constitute prosecutorial misconduct. (*See* Def. Mikell's Br. of Remand at 17-20.) Moreover, the government raised initial concerns regarding Mr. Harris's representation of Defendant Mikell in the beginning of the case, and although those potential conflicts centered on successive representation and a potential "advice of counsel" defense, the Government also expressed concern that Harris's prior representation in the civil case touched upon criminal conduct alleged in the Indictment. (*See* 02/16/99 Conf. Tr. at 17.) Defendants' counsel did not directly respond to this concern. Defendant Mikell and his lawyers were in the position to know of any criminal involvement by Harris and cannot now invoke ignorance of such

conduct to create an actual conflict of interest and to argue that prosecutorial misconduct caused him prejudice when the evidence at trial revealed a potential link between Harris and the underlying conspiracy.

Defendants' motion for a new trial based on prosecutorial misconduct will be denied because the remarks by the Government during closing were not improper and Defendants invited any error associated with the evidence of Harris's involvement in the conspiracy drawn out during the trial testimony. There is no spillover effect regarding Defendant Grisel.

V. CONCLUSION

IT IS ORDERED that Defendants' Mikell and Grisel's motions for a new trial are DENIED.

/s/
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: November 18, 2004

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 07-1488/1524

[Filed November 25, 2009]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
ALAN MIKELL AND CHRISTOPHER GRISEL,	)
	)
Defendants-Appellants.	)
	)

O R D E R

BEFORE: GILMAN and MCKEAGUE, Circuit Judges; and SARGUS,* District Judge.

The court having received two petitions for rehearing en banc, which were circulated to all active judges of this court, none of whom requested a vote on

* Hon. Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk